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NOS. 1116 AND 1117

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

JAMES C. KIRKPATRICK, Secretary of State of Missouri, and NORMAN H. ANDERSON, Attorney General of Missouri,
Appellants (No. 1116),
and
F. V. HEINKEL, R. J. ROSIER, et al.,
Appellants (No. 1117),
vs.
PAUL W. PREISLER, LOUISE ERBE, et al.,
Appellees.

On Appeal from the United States District Court For the Western District of Missouri, Central Division.

Appeal Docketed February 14, 1968.
Probable Judisdiction Noted March 4, 1968.
APPENDIX (Rules 17 and 36).

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

PAUL W. PREISLER, et al.,
Plaintiffs,
vs.
THE SECRETARY OF STATE OF MISSOURI and THE ATTORNEY GENERAL OF MISSOURI,
Defendants,
and
F. V. HEINKEL, et al.,
Intervenor-Defendants.
} No. 1064.

RELEVANT DOCKET ENTRIES.

1. September 1, 1967.—Defendant's Motion for Approval of Congressional Apportionment and for Termination of Proceedings, with Suggestions in support thereof filed.

• • •

2. September 18, 1967.—Suggestions of Plaintiffs in Opposition to Motion of Defendants—filed.

3. October 6, 1967.—Transcript of Pre-Hearing Conference of September 26, 1967—filed.

4. October 12, 1967.—Stipulation of Evidence—filed (With Exhibits).

• • •

5. October 23, 1967.—The case is called for a hearing before Judge Matthes, Judge Oliver and Judge Collinson, Judge Matthes; Presiding. Parties appear by counsel and announce ready for the hearing. Defendants introduce testimony and rest. The plaintiffs present evidence (exhibits) and rest.

• • •

6. October 31, 1967.—Transcript of Proceedings held on October 23, 1967—filed.

• • •

7. December 29, 1967.—Judgment & Decree—filed.

• • •

8. January 12, 1968.—Defendant's Motion to Stay Order, Judgment and Decree Pending Appeal—filed. Statement in Support of Defendants' Motion to Stay Order, Judgment and Decree Pending Appeal—filed.

Defendants' Notice of Appeal to the Supreme Court of the United States—filed.

9. January 18, 1968.—Plaintiffs' Memorandum in Opposition to Defendant's Motion to Stay Order, Judgment and Decree, Pending Appeal—filed.

10. January 22, 1968.—Intervenor-Defendants' Notice of Appeal to the Supreme Court of the United States—filed.

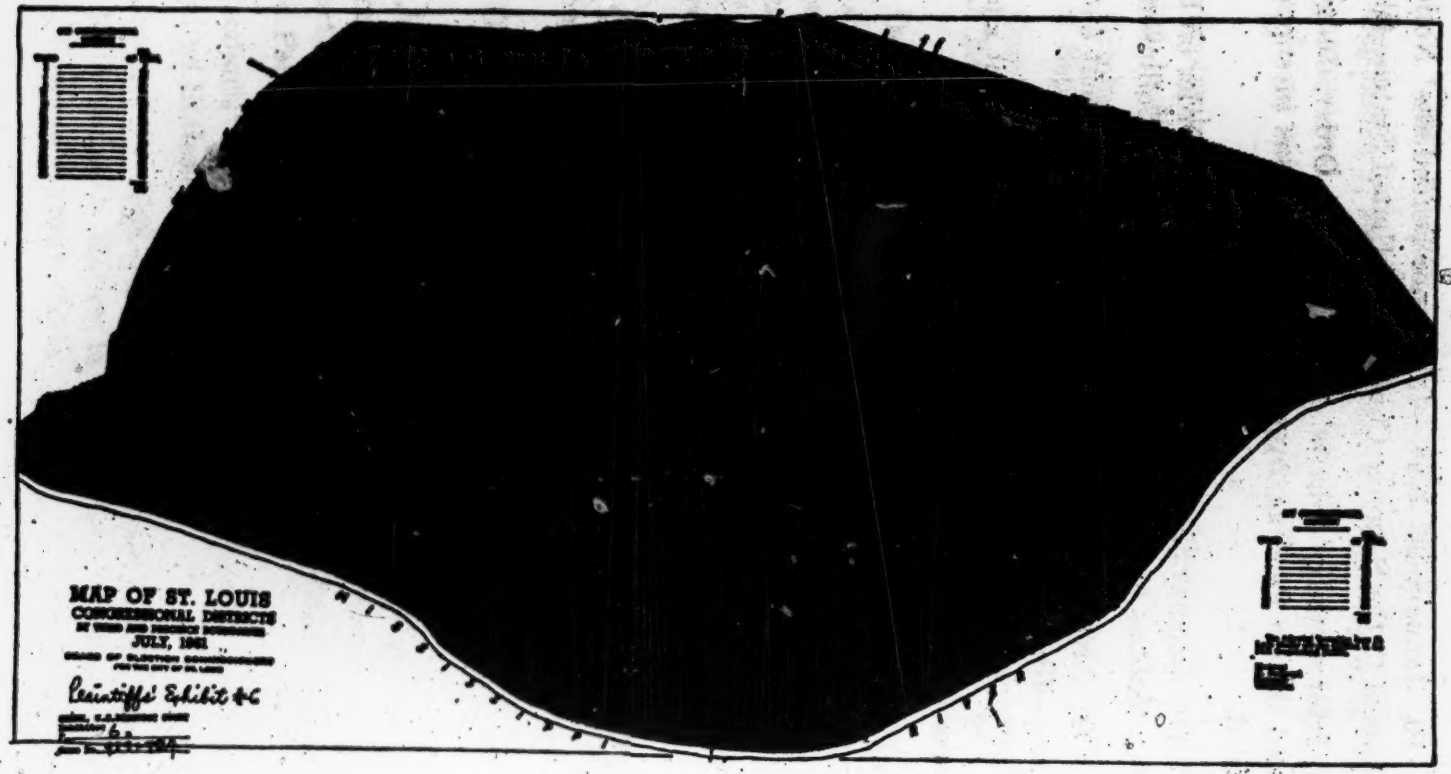
Intervenor-Defendants' Motion to Stay Order, Judgment and Decree Pending Appeal with suggestions in support—filed.

11. January 30, 1968.—Memorandum and Order on Pending Motions to Stay—filed (Judges Oliver & Collinson).

12. January 30, 1968.—Order to Stay Judgment and Decree—filed (Judge Matthes).

13. January 30, 1968.—Order Staying Judgment and Decree—filed (Judge Matthes).

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI, CENTRAL DIVISION



IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

EXHIBIT NO. 18

U.S. DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS
WASHINGTON, D.C. 20233

OFFICE OF THE DIRECTOR

January 18, 1967

City of St. Louis
Population by Wards *

Ward	1960 Population
1	19,462
2	30,372
3	36,622
4	25,151
5	37,588
6	18,595
7	47,106
8	29,171
9	32,602
10	23,971
11	28,683
12	20,891
13	20,624
14	20,281
15	25,214
16	15,470
17	33,883
18	25,701
19	31,441
20	25,030
21	22,920
22	29,148
23	24,876
24	22,651
25	29,349
26	25,635
27	19,928
28	27,622

* Source: 1960 Census of Population and Housing, City Blocks, St. Louis, Missouri, Series HC(3)-232

(The population totals for wards were compiled from the reported totals by blocks. The sum of these figures for wards is 39 people less than the total given in Vol. I for St. Louis. This difference results from a number of technical factors in the processing of the data. It has no effect on relative standing of the wards.)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

EXHIBIT NO. 23

U.S. DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS

February 14, 1967

IN REPLY REFER TO
JEFFERSONVILLE CENSUS OPERATIONS OFFICE
1201 East 10th Street
JEFFERSONVILLE, INDIANA
47130

Honorable Robert A. Young
State Senator
State House
Jefferson City, Missouri 65101

Dear Mr. Young:

This will confirm your telephone conversation with Mrs. McKeown of this office.

The following are the 1960 population figures for the present townships in St. Louis County, Missouri:

Township	1960 Population
Airport	68,480
Bonhomme	53,779
Clayton	51,092
Concord	36,273
Creve Coeur	48,661
Ferguson	34,229
Florissant	41,084
Gravois	52,206
Hadley	24,720
Jefferson	35,649
Lemay	40,095
Lincoln	22,380
Meramec	9,528
Midland	50,417
Normandy	37,673
St. Ferdinand	66,420
Spanish Lake	11,522
Washington	19,304
Total	703,532

Please feel free to call us at any time if additional information is needed.

Sincerely yours,

Joe D. Kolb

Joe D. Kolb, Chief
Geography Operations Branch
Jeffersonville Census Operations Office

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

(TITLE OMITTED IN PRINTING)

MOTION FOR APPROVAL OF CONGRESSIONAL APPORTIONMENT AND FOR TERMINATION OF PROCEEDINGS.

Defendants move the court as follows:

1. The court's opinion, judgment and decree issued in this cause on August 5, 1966, found that the 1965 Missouri Congressional Redistricting Act, Sections 128.202 to 128.305, RSMo, did not comply with Article I, Section 2, of the Constitution of the United States and was, therefore, unconstitutional and void. The court retained jurisdiction of this case for the purpose of reviewing any new congressional redistricting plan that might be enacted by the General Assembly of Missouri and signed by the Governor.

2. Pursuant to the opinion, judgment and decree of the court aforesaid, the 74th General Assembly of the State of Missouri enacted House Substitute for Senate Committee Substitute for Senate Bill No. 182, which enactment was signed into law by the Governor of Missouri and a copy of which is appended hereto as Appendix A. Said law is popularly known as the 1967 Congressional Redistricting Act. Said law divides the State of Missouri into ten congressional districts and becomes effective October 13, 1967, by operation of law.

3. The congressional districts established as aforesaid comply with the command of Article I, Section 2, of the Constitution of the United States. An ideal average district would include 431,981.3 population in each of the ten districts. The largest of said districts is district number 2 with

a population of 442,302. The smallest of said districts is district number 4 with a population of 423,815. Attached hereto as Appendix B is a map of the State of Missouri reflecting the geographical boundaries of the districts together with the population of each district. All of the population figures referred to in this paragraph are based upon the United States Census for 1960.

WHEREFORE, Defendants pray that the court enter its order approving the 1967 Congressional Redistricting Act for the State of Missouri; that the court enter its order discharging defendants from further process in this cause; and that the court enter its order terminating these proceedings.

Respectfully submitted,

NORMAN H. ANDERSON
Attorney General

By /s/ THOMAS J. DOWNEY
Assistant Attorney General
Supreme Court Building
Jefferson City, Missouri
Attorneys for Defendants.

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

APPENDIX B

The Ten CONGRESSIONAL DISTRICTS of Missouri

(As Redrawn By The 74th General Assembly - 1967)

CONGRESSIONAL DISTRICT POPULATION

DISTRICT 1 - 436,417
DISTRICT 2 - 442,302
DISTRICT 3 - 431,507
DISTRICT 4 - 423,815
DISTRICT 5 - 430,412
DISTRICT 6 - 425,238
DISTRICT 7 - 436,769
DISTRICT 8 - 439,984
DISTRICT 9 - 428,223
DISTRICT 10 - 423,866

(TITLE OMITTED IN PRINTING)

SUGGESTIONS IN SUPPORT OF MOTION FOR APPROVAL OF CONGRESSIONAL APPORTIONMENT AND TERMINATION OF PROCEEDINGS.

I.

This case is before the court upon the complaint of plaintiffs that the 1965 Missouri Congressional Redistricting Act was unconstitutional for the reason that the population of the ten congressional districts established by the Act violated the constitutional principle of "one man—one vote". The Supreme Court of the United States in Wesberry v. Sanders, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481, held that as nearly as is practicable, one man's vote in a congressional district is to be worth as much as another's. This court held that the Act in question did not comply with Article I, Section 2, of the Constitution of the United States as construed by Wesberry v. Sanders, supra, and was, therefore, unconstitutional and void; 257 F.Supp. 953.

An appeal from the opinion, judgment and decree of this court was taken by defendants to the Supreme Court of the United States. On January 9, 1967, the judgment of this court was affirmed by per curiam decision of the Supreme Court; Kirkpatrick, et al. v. Preisler, et al., 385 U.S. 450, 17 L.Ed.2d 511.

The decision of this court retained jurisdiction of this matter as follows, 257 F.Supp. l.c. 982:

> "* * * We shall retain jurisdiction of this case for the purpose of reviewing any new congressional redistricting plan that may be enacted by a future General Assembly of Missouri and signed by the Governor.
>
> "If we find that such new legislation is consistent with the constitutional command of Art. 1, § 2, this case

would then be reopened and our decree will be set aside.

"If we should find otherwise, the congressional elections for Missouri will be ordered conducted at large until new and constitutional districts are created."

The retention of jurisdiction in the court's judgment and decree is stated as follows, 257 F.Supp. l.c. 985:

"Fourth: The Court retains jurisdiction of this cause for such other and further orders as may be appropriate and required.

"Fifth: This judgment and decree is final; jurisdiction being retained solely for the purpose of enabling the Court to reopen this case on appropriate motion by any party for the purpose of presenting for the Court's future consideration the constitutionality of any subsequently enacted legislation relating to Congressional Redistricting for the State of Missouri that may in the future become the law of Missouri.

"It is so ordered."

Therefore, it is clear that the court has jurisdiction to entertain plaintiffs' motion.

II.

Pursuant to the decision of this court as affirmed by the Supreme Court of the United States, the 74th General Assembly of the State of Missouri enacted a new Congressional Redistricting Act establishing ten new congressional districts in the State of Missouri. The Act was signed into law by the Governor of the State of Missouri and will become effective by operation of law on October 13, 1967. A copy of this law is appended to plaintiffs' motion as Appendix A. There is also appended to plaintiffs' motion as Appendix B a map of the State of Missouri reflecting the geographical boundaries of the new congressional districts, together with a table reflecting the population of each of the ten new con-

gressional districts according to the United States Census for 1960.

It appears to plaintiffs that the opinion of this court in regard to permissible population variations in congressional districts is summarized by the court in the following language, 257 F.Supp. 973:

> "[5] The basic constitutional principle of equal representation established by Art. 1, § 2 forbids and eliminates, so far as congressional representation is concerned, the consideration of any factor other than population. Use of such words as 'feasible' and 'practicable' in a careful statement of the fundamental constitutional principle constitutes but a recognition that the familiar doctrine of de minimis is applicable and is designed to make clear that a State legislature would not be expected to create entirely new political subdivision lines in order to have absolute and precise mathematical equality in its congressional districts.
>
> "Various courts other than the Supreme Court have stated the basic constitutional principle of equal representation applicable to congressional districting in words as unequivocal as those used repeatedly in Wesberry v. Sanders.
>
> "For example, Calkins v. Hare, E.D. Mich. 1964, 228 F.Supp. 824 at 829, in which it was held that '[o]ne factor and one alone is controlling, the factor of population.' Meeks v. Anderson, D.Kan. 1964, 229 F.Supp. 271 at 273, held that 'one factor, and only one, may be taken into account in apportioning and establishing the congressional districts among the people of a state and that factor is population.' And Bush v. Martin, supra, subsequently affirmed by the Supreme Court, in addition to what has already been quoted, stated the applicable con-

stitutional principle still another way: 'Members of Congress are to be elected on the basis of population and nothing else' (224 F.Supp. at 511)."

In Swann v. Adams, 385 U.S. 440, 17 L.Ed.2d 501, the Supreme Court of the United States appeared to emphasize the adherence to de minimis population variations in state legislative schemes. The court held that population variations in excess of de minimis deviations must be minor and must be based on legitimate considerations incident to the effectuation of a rational state policy. Although Swann v. Adams, supra, was concerned with state legislative apportionment, in Duddleston v. Grills, 385 U.S. 455, 17 L.Ed.2d 508, the court remanded a congressional redistricting case from Indiana to the lower court for further consideration in light of Swann v. Adams, supra.

It is plaintiffs' contention that the districts resulting from the 1967 Congressional Redistricting Act comply with the doctrine of de minimis in regard to population variations between the districts. Although this court has condemned mathematical arguments to justify population variations in congressional districts (257 F.Supp. l.c. 973, et seq.), plaintiffs believe that a reference to certain mathematical factors will reflect that population variations in the congressional districts in question are de minimis. The population of the State of Missouri according to the 1960 Census was 4,319,813. Thus, if the ten districts embraced population of aboslute equal weight, each district would have a population of 431,981.3.

Under the 1967 Congressional Redistricting Act the largest district is district number 2 with a population of 442,302. District number 4 is the smallest district with a population of 423,815. Thus, the largest district has a population of 18,487 in excess of the smallest district. The ratio of the largest district to the smallest district is 1.04.

The de minimis nature of the population variations may also be measured by comparing the largest district with the average ideal district. District number 2 has a population of 442,302. The average ideal district would be composed of a population of 431,981. Thus, the largest district has a population of 10,321 in excess of an average ideal district. This represents a population in the largest district of 2.38 per cent in excess of an average ideal district.

The de minimis nature of the population variations is also demonstrated by a comparison of the smallest district with the average district. District number 4, with a population of 423,815, is the smallest district. In comparison with an average district it has a population of 8,166 less than such average district. Stated in another manner, the population of the smallest district is 1.89 per cent less than an average ideal district.

The 1967 Congressional Redistricting Act of Missouri complies with the opinion, judgment and decree of this court and with the command of Article I, Section 2 of the Constitution of the United States in regard to equality of population among the various districts. Therefore, plaintiffs' motion should be granted.

Respectfully submitted,

NORMAN H. ANDERSON
Attorney General

By /s/ THOMAS J. DOWNEY
Assistant Attorney General
Supreme Court Building
Jefferson City, Missouri
Attorneys for Defendants.

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

(TITLE OMITTED IN PRINTING)

SUGGESTIONS OF PLAINTIFFS IN OPPOSITION TO MOTION OF DEFENDANTS.

I

Plaintiffs oppose the motion of Defendants which prays that the court ". . . enter its order approving the 1967 Congressional Redistricting Act for the State of Missouri; that the court enter its order discharging defendants from further process in this cause; and that the court enter its order terminating these proceedings."

Plaintiffs contend that the 1967 Congressional Redistricting Act (House Substitute for Senate Committee Substitute for Senate Bill 182; copy of which is "Appendix A" of Defendants' Motion) does not comply with the provisions of Article I, Section 2 of the United States Constitution, because the populations of the districts are not as nearly equal as is practicable since the differences between district populations are substantial, not trivial, and because the differences could have been greatly reduced by simple transfer of existing political units from one district to an adjacent district.

Plaintiffs pray the Court to overrule Defendants' motion and to find that the 1967 Congressional Redistricting Act to be unconstitutional and void and to order that the elections for Representatives in Congress be conducted at large until new constitutional districts are created, and further that the Court retain jurisdiction of this cause for such other and further orders as may be appropriate and required.

The Court, in **Preisler et al., v. Secretary of State of Mis-**

sourl, et al., 257 F.Supp. 953, has extensively discussed the constitutional issues pertaining to Congressional Representative Districting and the judicial constructions and determinations applicable thereto. Applying the findings of law as set forth in this case to the 1967 Redistricting Act, Plaintiffs contend that the conclusion is inescapable that the 1967 Redistricting Act is unconstitutional and void.

II.

The district population data presented by Defendants in their "Appendix B" has been recalculated by Plaintiffs using the official census data in evidence in this case and significant mistakes have been found.

The sum of the district population of Defendants' table is 4,318,533, whereas the census figure is 4,319,813; this is a discrepancy of 1,280. The Seventh District is correct, 436,769; Defendants' Tenth District figure is 423,866, whereas the census figure is 423,868 making Defendants' low by 2, which difference is trivial; Defendants' Sixth District figure is 425,238, whereas the census figure is 422,238 making Defendants' too high by 3,000. This is a significant and substantial discrepancy which makes the Sixth District the lowest in the State that can be precisely calculated; and, although the Fourth and the Fifth cannot be separately calculated, the sum of the population of the Fourth plus the Fifth can be calculated. This sum for Defendants' district populations is 854,227, whereas the census figure is 850,899 making Defendants too high by 3,328. This too is a significant and substantial discrepancy. The remaining districts have not been calculated by Plaintiffs because complete population data of townships, wards, and precincts, is not readily available because some of the boundaries of these political subdivisions have been redrawn since the 1960 Census and the General Assembly has obviously used the new boundaries. Thus the difference between the highest

district (Second), using the Defendants' figure of 442,302 and the lowest district (Sixth) using the census figure of 422,238, is 20,064. The discrepancy between the highest and the lowest districts might even be greater depending upon how the 3,328 discrepancy of the sum of the Fourth and the Fifth is distributed between these two Districts.

The sum of the foregoing significant and substantial discrepancies (of Districts Four plus Five, and Six) of Defendants' figures amounts to 6,328. Defendants' figures when lowered to the census figures will necessitate Defendants' remaining district figures to be increased in order to account for the total population of the State, possibly even increasing the maximum difference between the highest and lowest district.

III.

The map of the districts created by the Act, which map Defendants present to the Court as "Appendix B" of Defendants' Motion, when county and township populations are appended thereto, will show on its face that several of the districts could have very easily been made more equal by the simple expedient of the transfer of existing political subdivisions from one district to an adjacent district.

The General Assembly in creating the districts has utilized whole counties, townships, wards, precincts of townships, and precincts of wards. With such low population political subdivisions available through the State, there is no excuse for failing to make the districts closer to equality of population than the district populations shown in the aforesaid "Appendix B" or Appendix B as corrected above.

In presenting the following examples to the Court showing that the populations of the districts could easily have been made closer to equality, Plaintiffs do not suggest that these particular changes must be the specific changes made,

but simply to prove that the General Assembly did not comply with constitutional provisions of Article I, Section 2 and might without difficulty have complied.

The district populations below are from "Appendix B" of Defendants' Motion and the population of counties and townships from the bulletin, "U.S. Bureau of the Census. **U.S. Census of Population: 1960. Number of Inhabitants, Missouri.** Final Report PC(1)-27A." in evidence in this case.

(1) District Eight with population of 439,984 is 16,118 greater than the adjacent District Ten with 423,866. If Dent County, 10,445, were transferred from District Eight to District Ten, the new Eighth would have 429,539 and the new Tenth 434,311, a significant improvement over the original district populations.

(2) If such change as suggested in (1) is considered undesirable because it might raise the question of making the Eighth less compact and thereby possibly violating the provisions of Article III, Section 45 of the Missouri Constitution as to compactness of districts, then instead the nine southernmost townships of Texas County, whose aggregate population is 7,742 (Morris, Cass, Carroll, Ozark, Clinton, Burdine, Sargent, Pierce, and Date townships; see bulletin PC(1)-27A, pages 27-5 and 27-23) could be transferred to the Tenth with greater approach to the average of 431,981 than in the shift suggested in (1) for this new Eighth would have 432,242 and the new Tenth would have 431,608. Closer approach to population equality is thus easily attainable! In this instance compactness would also be improved.

(3) Another obvious transfer is to shift Hickory County, 4,516, from District Seven with population of 436,769 to the adjacent District Four with population of 423,815, making the new Seventh 432,253 and the new Fourth 428,331, both

new districts being significantly closer to the average of 431,981.

(4) When the districts are examined which are in or extend into the City of St. Louis or St. Louis County, the First, Second, Third, Eighth and Ninth, it is obvious that a shift of a few of the existing precincts in this populous area would easily produce districts with much closer approach to equality, or the average, as now exists. A map of this area is attached hereto "Plaintiffs' Exhibit A".

The changes described indicate that the General Assembly did not create districts as nearly equal in population as it might have easily created by a few obvious shifts of existing political units between adjacent districts. To permit significant population differences to remain, when smaller differences could be easily attained, is not permissible under the constitutional provisions of Article I, Section 2. Many other possible changes which would bring the districts closer to the population average without much disturbance of the general district boundaries or areas can be discovered upon examination of the map and population tables; the selection of the particular changes are, of course, within the discretion of the General Assembly.

Sufficiently close and easily attainable population equality of the districts has not been accomplished in the 1967 Congressional Redistricting Act by the General Assembly, therefore, the districts are unconstitutional and void and should be so declared by the Court and the election ordered to be conducted from the State at large.

IV.

The Governor of Missouri is empowered by Article IV, Section 9 of the Missouri Constitution to convene the General Assembly on extraordinary occasions. The Governor has indicated in the public press that he intends to so con-

vene the General Assembly in January 1968 for certain matters.

Plaintiffs request the Court for an early determination of the issues involved in Defendants' Motion and related matters in this cause so that, if the Court finds that the 1967 Redistricting Act is unconstitutional and void, the Governor could include congressional districting as a matter he deems necessary for action by the General Assembly in his call for convening the extra session.

The General Assembly in such extra called session, assuming that it is convened in January 1968, should be able to complete any districting act in ample time before the last filing date for candidates for the primary election, April 30, 1968.

V.

WHEREFORE, Plaintiffs pray the Court to overrule Defendants' Motion and to find that the districts are unconstitutional and void, to order that the congressional elections for Missouri be conducted at large until new and constitutional districts are created, and to retain jurisdiction of this cause for such other and further orders as may be appropriate and required.

VI.

Plaintiffs request oral argument on Defendants' Motion and upon the related matters raised by said motion contained in the decree and order of the Court in this cause.

Respectfully submitted,
/s/ PAUL W. PREISLER
Attorney for Plaintiffs
4274 Shenandoah Avenue
St. Louis, Missouri 63110
314-664-8530

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

(TITLE OMITTED IN PRINTING)

TRANSCRIPT OF PROCEEDINGS.

Be it remembered that heretofore on Tuesday, the 26th day of September 1967, the above-entitled cause came on for conference in chambers, before the Honorable John W. Oliver, Judge of Division One of the above court, sitting at Jefferson City, Missouri, and the following proceedings were had and entered of record:

The plaintiffs were represented by Mr. Paul W. Preisler, Attorney at Law, 4274 Shenandoah Avenue, St. Louis, Missouri.

The defendants were represented by Mr. Thomas J. Downey, First Assistant Attorney General, and Mr. Loren Wood, Assistant Attorney General, Office of the Attorney General, Jefferson City, Missouri.

The Intervenor-Defendants were represented by Mr. David Collins, of the law firm of Edwards, Hess & Collins, Macon, Missouri.

* * *

(Whereupon, at 9:00 A.M., the following proceedings were had in court chambers:)

THE COURT: Let the record show that the conference today convened was pursuant to the notice that went forward from my law clerk on September 19, 1967, to counsel for the plaintiff, the defendants and the intervenors, that letter having been sent from Kansas City after a conference held in St. Louis that day during the Eighth Circuit Judicial Conference with Circuit Judge Mathes and District Judges Oliver and Collinson.

I might also state for the record that immediately upon the filing of the motion by the Attorney General, I called Chief Judge Vogel of the Eighth Circuit to make inquiry whether the composition of the three-judge court would be the same. He advised me that it would be because the three-judge court had retained jurisdiction of this cause, and asked me to so advise Judge Mathes and Judge Collinson, which I did.

A very informal discussion and a short informal discussion with counsel suggested that it is agreeable to everyone that the Court first state the posture of the case and then we discuss on the record and off the record some of the problems that relate to the factual data that can be stipulated in this case in its present posture.

The files and records in the case will show that on August 5, 1966, the three-judge Court, composed as I have stated, rendered its decision as reported in 257 F.Supp., Page 953, and also issued its judgment and decree as that judgment and decree appears on Page 984 of 257 F.Supp.

In that case the 1965 Missouri Congressional Redistricting plan was held to be constitutionally void. It was secondly held that the plaintiffs' prayer for relief should be and was granted. Thirdly, that because of circumstances with which counsel are familiar and as worked out in the initial pretrial of that case, the 1966 elections were held not to be affected by the Court's decree, it being anticipated that the General Assembly of Missouri would endeavor to enact a plan consistent with the command of the Constitution of Missouri and the Constitution of the United States.

Jurisdiction of the case was retained and the fifth paragraph of the judgment and decree provided that the judgment and decree was final in order to avoid any possible question of appellate review, jurisdiction being retained

solely for the purpose of enabling the Court to reopen this case on appropriate motion by any party for the purpose of presenting for the Court's future consideration the constitutionality of any subsequently enacted legislation relating to congressional redistricting for the State of Missouri that may in the future become the law of Missouri.

An appeal was perfected from that three-judge judgment to the Supreme Court of the United States on September 1, 1966, and on January 9 the Supreme Court of the United States affirmed in a single sentence opinion now officially reported in 385 U.S. 450. The Supreme Court of the United States returned its mandate on February 8, 1967, returning jurisdiction of the case to this Court.

On September 1, 1967, the files and records will show that the Attorney General of Missouri filed a motion for approval of congressional apportionment and for termination of proceedings, and also filed suggestions in support of that motion.

Very briefly, and I think sufficiently for this preliminary statement of the record, the motion alleges that the General Assembly of Missouri enacted House Substitute for Senate Committee Substitute for Senate Bill No. 182, a copy of which is attached to the motion of the Attorney General as Exhibit A, that bill having been signed by the Governor and therefore enacted into law.

The Attorney General alleges in his motion that the congressional districts established by that bill do comply with the command of Article I, Section 2, of the Constitution of the United States, and in Paragraph 3 of the motion attaches as Exhibit B a map of the State of Missouri reflecting the geographical boundaries of the districts together with the population purportedly within each of the ten districts.

Now, although the Attorney General's motion alleges that,

"All of the population figures referred to in this paragraph are based upon the United States census for 1960," it is obvious, as we have noted off the record, that the total population allocated to the various ten districts do not in fact add up to the undisputed and stipulated fact that the population of Missouri, in accordance with the 1960 census, was 4,319,813; the figures add up to 4,318,533.

The problem is therefore presented, and one that we will explore thoroughly by informal discussion, which, of course, is a part of the pre-trial procedures, but to reduce the formal court record I will follow my usual practice of attempting to summarize whatever conclusions we may arrive at, simply to cut down the amount of reporting necessary to make the record accurately reflect the agreements and understandings and directions that may be made.

The Attorney General's basic theory seeking affirmative action from this three-judge court is predicated upon the contention set forth on Page 4 of the Attorney General's motion, in which it is suggested that the districts resulting from the 1967 Congressional Redistricting Act comply with the doctrine of de minimis in regard to population variations between the districts.

Within time extended under the local rule, the plaintiffs have filed a response and suggestions in opposition to the Attorney General's motion. Those suggestions direct attention to the apparent inaccuracy of the map attached to the Attorney General's motion and also place in issue the allegation that the population variations are within the doctrine of de minimis but that the variations are substantial and that a more practicable apportionment could have been made, illustrating this point by several examples of where the shift of a single county between two adjoining districts would have brought both districts closer to the average

dictated by the mathematics of dividing ten into the total population.

Now, let me inquire of counsel whether I have correctly stated where our present posture is, as reflected by the files and records in the case at this point. Let me inquire of Mr. Preisler whether this is a fair statement as far as it goes?

MR. PREISLER: You stated, Judge, that the map was objected to. It was really the populations accompanying the map is the primary difficulty. The map, as far as the State itself goes, and the out-state areas, is essentially correct. It is the figures.

THE COURT: The figures on the map. When I say map, you mean Exhibit B, and I think the record will also show that even in adding up the identifiable counties within a particular district, that the Exhibit B does not accurately reflect the population figures established by the stipulated evidence in this case; there being variations, as I recall, of as much as two or three thousand votes in adding up particular districts.

Other than that suggestion is the statement satisfactory to plaintiffs?

MR. PREISLER: Yes.

THE COURT: Any additions or corrections, Mr. Downey, or does this correctly state—

MR. DOWNEY: Again one slight correction, Judge. I believe the variations will show a difference of two or three population rather than votes.

THE COURT: Yes, and we will get into the details just exactly where the figures do not gibe and attempt to find out what figures the Legislature in fact did use, what articulation, if any, the Legislature made in using figures other

than the 1960 census, and I will attempt to summarize for the record as we get into this exactly what our factual situation is and what solution we can agree on to have accurate figures in which we may work.

Ather than the suggestion you have made, Mr. Downey, is the Court's description of our present posture accurate?

MR. DOWNEY: I agree with the Court's description, Your Honor, and at the appropriate time I would like to state for the record the source of the map that was appended to our motion.

THE COURT: I think it might be well to state that now and we won't have to repeat it. Would you state where Exhibit B came from?

MR. DOWNEY: Yes, Judge, when we were preparing this motion, I checked with the Office of the Secretary of State in an attempt to get an official map, and official population figures for these districts, the new districts. The Secretary of State had prepared a map together with population figures for inclusion in the next publication of the Blue Book, the Blue Book being the official manual of the State of Missouri.

Material for the Blue Book had already gone to the printer. A copy of the map and the population figures had not been retained in the Office of the Secretary of State. However, I was informed that there was on file in the Office of the Secretary of State a map with population figures which the staff of the Secretary of State's office thought corresponded with the official map that is being included in the Blue Book.

I was told that the source of this map was the Missouri State Chamber of Commerce, and a copy of that map was made available to me. Upon receiving the map, I checked with the Missouri State Chamber of Commerce in an at-

tempt to determine the source of the population figures that had been used on the map. I was informed by the Offices of the Missouri State Chamber of Commerce that the map came from newspaper sources, that the Capitol Press corps had used these figures in reporting the enactment of their legislation.

It was suggested to me that the Jefferson City reporter for the Kansas City Star would be able to furnish me the source of this information; specifically, Mr. Henry Clay Gold. So I checked with Mr. Gold in regard to the source of the population information, and Mr. Gold informed me that these figures came from the House Committee and the Senate Committee that had done the basic work on this legislation. I also checked with Mr. Jones of the St. Louis Globe Democrat who also informed me that these population figures came from the Committee sources that were referred to me by Mr. Gold.

THE COURT: May I interrupt you? Were you able to get any working papers from the House Committee or the Senate Committee that were retained and any maps that they may have used?

MR. DOWNEY: Judge, I did not attempt to do so, for this reason. The Chairman of the Senate Committee lives in Troy, Missouri. The Chairman of the House Committee lives in New Madrid, Missouri. The Legislature is not in session and was not in session at the time I prepared my motion, and I was sufficiently satisfied with the reliability of the population figures that I though for the purpose of getting this case underway again, that verification could come at a later date for verification. The committees do not maintain any staffs and they do not have offices that are open except during the regular session of the General Assembly.

Now, even during the regular session of the General As-

sembly, the Committees do not maintain working staffs. Their staffs are entirely secretarial and clerical.

THE COURT: Do they maintain any official files that reflect the transaction of the State's business?

MR. DOWNEY: To my knowledge—now, there again I am speaking from information and belief, the only files that are maintained are the personal files of the committee chairmen of the two committees.

THE COURT: Was the Attorney General's office in consultation with members of the General Assembly and its committees during the reworking of the third attempt on reapportionment?

MR. DOWNEY: Not—we had nobody assigned to the committee as such. It was not requested of the Attorney General's office, and we are very careful not to interpose ourselves to in any way upset the delicate balance between the legislative and executive departments of the Government, and we felt that our position should be to take a standby position and that we would thoroughly advise with the committees if consultation was requested. Consultation was not requested generally during the work of the committees. There were several times during the legislative session when we were asked specific questions and we advised on specific questions.

THE COURT: I take it then that you have no files that could be called official files that would be within an official record admissibility requirement, an official file kept by your office in connection with this matter?

MR. DOWNEY: We do not have, Judge.

THE COURT: And you have stated for the record your full information as to where Exhibit B came from?

MR. DOWNEY: Yes, Judge.

THE COURT: Thank you.

MR. DOWNEY: I might just include by referring, Judge, to the map that appeared in the Kansas City Star on July 5, 1967, which was the week following the close of the General Assembly. This particular bill that we are talking about was enacted, oh, I believe on Thursday of the last week of the General Assembly. The General Assembly adjourned on Friday night, and this map appeared on July 5, and the population figures reflected on the map are identical with the ones that we have appended to our motion.

The arrangement of the population figures is not the same. In other words, it is not in tabular form. They are attached to the individual districts, but the population figures were identical.

THE COURT: Mr. Collins, do you have any additional information or does the Court's statement correctly phrase our problem?

MR. COLLINS: I think it does, Your Honor. I have nothing in addition.

THE COURT: Mr. Preisler, did you have an additional comment to make on the record? I am about to suggest that we get off the record and see how we can really get down to obtaining agreement on what cannot, as I see it, be any real dispute about what the facts are.

MR. PREISLER: May I point out that the bill that was finally passed, as a House bill, not a House Committee bill, as is sometimes finally presented to both houses of the Legislature, also—

THE COURT: Now, wait a minute. Let me see the point that you are making there. Exhibit A I described from the

motion of the Attorney General, and printed on this bill—and I assume we will have all of the various bills in evidence before we end today—has on the top of it, "Truly agreed to and finally passed," and it is described as the House Substitute for Senate Committee Substitute for Senate Bill No. 182.

MR. PREISLER: My point is that this is not a House Committee bill, but a House bill itself. I am speaking of the bill that is finally passed. Therefore, I will say the House Committee bill, if it is authentic, is not as weighty as it would be as if it had come out as a House bill specifically with the figures attached.

The other fact is this, that nowhere in the statement of the Attorney General, which I am sure is correct, does it state whether or not this particular set of figures that they got—at what state of the development of the map and the figures it came. We don't know at what particular stage the press might have been handled by some member of the committee or the chairman of the House or Senate committee. They change from minute to minute, almost.

THE COURT: Well, gentlemen, won't some of this clarify itself when we have in this record the first bill that was introduced either in the House or the Senate, and how that legislative history progressed by the substitution by committee of these particular bills in much the same manner that we found this legislation having been enacted in 1965.

We had in that record each and all of the bills; indeed the three-judge opinion, consistent with the practice and procedures and rules of decision and rationale of other three-judge courts made reference to that legislative history in making judgment on the 1965 redistricting bill.

Now, I quite agree with you that there is a possibility that a newspaper reporter attempting to keep up with enact-

ment of legislation in the closing days of a session—as I recall, the '65 legislation passed on the last day, didn't it?

MR. DOWNEY: Right at the stroke of midnight, Judge.

THE COURT: Toward midnight on the last day. The present legislation beat that by one day, as I understand the Attorney General's statement. But I have no idea of the substitutions that were made, but I think it quite possible that the newspaper reporter may have taken figures or made calculations off of some bill that was in the process of being changed back and forth.

I am not of the judgment that anyone is going to contend that the population figures published by any newspaper or by a Chamber of Commerce or anyone else is going to be the basis of the factual data.

Geographic boundaries, I assume, in this bill do not have the problem involved in '65, where there was some question as to whether a particular precinct belonged in one district or another.

I have not studied the enactment, but I would assume that all of the geographic area is defined by the bill and that we can figure out what those geographic areas are and check them against the census tracts that are in evidence and that the population that is included in those geographical areas will be the allocation of population that this Court must consider in ruling the motion to lift the injunction.

Now, do I anticipate or state anything contrary to what will eventually work out in figuring out how much population is in each of these districts?

MR. DOWNEY: Judge, we discussed this matter at great length yesterday afternoon, the three of us, Mr. Collins, Mr. Preisler and myself, and because of the discrepancies which have appeared in the map which we attached to our pleading,

I felt, and the other two agreed, that we should try to provide the Court with absolute accurate population figures that would be subject to no question, and in computing the population figures we do have some problems, some mechanical problems, in the districts that take in parts of Kansas City and parts of the City of St. Louis and parts of the county of St. Louis.

The problem is relating the 1960 census data to the precinct wards and townships which existed in 1967. In all three of these areas, new precinct lines, new ward lines and new township lines of the county of St. Louis have been drawn since 1960. I think in every instance the number of units has been increased, and so the boundaries are not the same.

It was suggested that we could get an accurate census count of the new districts in the city areas from the Bureau of the Census, and we agreed that the Attorney General's office could contact a member of Congress to handle this request for us.

In the 1960 census there are maps which are actually a part of the census, that were used by the Census Bureau. I refer to what is in evidence in this case as Plaintiff's Exhibit No. 7, being the census tracts for St. Louis, Missouri, and East St. Louis, Illinois.

As an example, a map of the City of St. Louis showing the wards and broken down in greater detail than wards is an actual part of the census.

So by utilizing the old maps and by furnishing the Census Bureau with new official maps from the appropriate election officials in St. Louis, St. Louis County and Jackson County, current accurate population figures based on the 1960 census can be computed by the Bureau of Census.

THE COURT: Mr. Downey, do you have any knowledge

as to whether or not the General Assembly recognized the problem that you have outlined and what the General Assembly took into account in drawing these districts?

MR. DOWNEY: No, I do not, Judge. But to complete what I was saying, in line with these conversations that we had yesterday afternoon, I called Congressman Hungate in Washington and discussed this problem with him last night, and he is very anxious to cooperate to see that this Court gets accurate population data for these new districts and that it gets it as soon as possible, and he has told me that if I will get his necessary information to him, including these maps, that he personally will take it to the Census Bureau and make the request and get it underway.

THE COURT: Let me add this additional comment on the record and to state my familiarity with the problems as I understand them in the utilization of census tracts which have projected and made figures more recent than the 1960 census.

This problem arose in the Jackson County Reapportionment case which pended before me, and I think it also arose in connection with the reapportionment of Clay County which pended before Judge Collinson. Because my knowledge of the Clay County case is simply judicial shop talk and therefore based on hearsay, let me say what I know of my personal knowledge in connection with the Jackson County case.

In the Jackson County case, the same problem arose, and at a conference not dissimilar from this, although the posture of that case was in an entirely different position, counsel agreed to stipulate the accurate figures from which the two county judge districts would be drawn and they were able from the publications of the Census Bureau that were available in Kansas City after consultation with people that

worked in the Bureau to project geographic lines and to actually agree upon the utilization of figures more current than the 1960 census, even though the projections had not been made on all of the census tract map, a copy of which I notice that you had in some of the data there.

The figures were agreed, using in every instance the most current census figures, recognizing that there would be some shifts of population that would not be reflected, yet these were the most accurate figures that could be obtained, and as I think was noted in one of the footnotes in the opinion, the division in the two districts was voluntarily worked out without the necessity of any court decree by those charged with the duty under the State law to have two districts of as equal population of compact districts to divide the county into an eastern district and a western district where tradition has had the boundary line of Jackson County, although, interestingly, the statute doesn't include any specific north or south or east or west line, simply to be divided into two equal parts.

Now, on the basis, gentlemen, of the experience—and I have worked with counsel from census data in that Jackson County case, we may be able to get much further with the information that we presently have.

I would suggest that we examine the various census books that you gentlemen, I think, probably looked at yesterday afternoon and lay out a schedule of what needs to be done so that we can get the facts stipulated on which the case will be submitted.

I want to commend counsel for spending the time together yesterday, because I think this problem can be attacked better today and you can bring me up to date on the conclusions that you may have arrived at, and you may have

all the answers and have some firm idea as to what the next best steps are.

Any objection from counsel on either side to going off the record and take a look at what we have here? Is that agreeable to everyone?

MR. COLLINS: Yes.

MR. DOWNEY: Yes.

MR. PREISLER: Yes.

THE COURT: Very well, let's close this portion of the record and I will come back on the record to state what hopefully will be a solution to our problem.

(Off-the-record discussion from 9:55 A.M. to 11:50 A.M.)

THE COURT: Let the record show after extensive and cooperative work with counsel, the following agreements may now be stated of record and the following direction for further proceedings established.

It is agreed by all parties that this case must be determined on the basis of the 1960 census figures and the constitutional validity of the 1967 Reapportionment Act so determined. None of the parties intend to contest this issue and no evidence will be introduced to the contrary.

It was agreed that Appendix B, published on Page 984 of 257 F.Supp. from the official manual of the 1961-1962 Missouri Blue Book, accurately reflected the population figures apparent on that exhibit.

It is apparent, however, that the only districts that can now be ascertained so far as accurate population is concerned, are the sixth, seventh and tenth districts, those districts being the only districts in the 1967 redistricting that do not require calculation of other than rural counties.

In regard to those districts, Mr. Preisler presented calculations that he had made from the census data already in evidence, which is assumed to be consistent with the map identified as Exhibit B in the 1965 case, and discrepancies between the census figures and Exhibit B attached to the Attorney General's pending motion were revealed to be as follows:

It should be stated of record that Mr. Preisler's figures are subject to check for mathematical accuracy and the statement of these figures is for the purpose of informing my brother judges of the background requiring a direction of further proceedings to be hereinafter stated.

Exhibit B shows a population for the sixth district of 425,238. Mr. Preisler's census figures indicate that only 422,238 population is included in the 1967 Act.

The figures set forth for the seventh district on Exhibit B, namely 436,769, checks with Mr. Preisler's calculations from the census figures.

District No. 10 has two more population included in its figure of 423,866, whereas, Mr. Preisler's census calculation is two population off.

Mr. Preisler also presented calculations made from census tracts which had been superimposed on new political boundaries for the third district. Exhibit B attached to the Attorney General's motion indicates a population of 431,507 for that district in the City of St. Louis and a sliver of St. Louis County, whereas Mr. Preisler's census calculations indicate a population of 436,099 as being in that particular district.

The problem of obtaining accurate factual data was fully discussed and Mr. Downey advised the Court that Representative Hungate had volunteered to use his good offices with

the Bureau of Census to the end of obtaining accurate population figures that may be the subject of stipulation by all the parties.

It was agreed that Mr. Downey and Mr. Preisler would meet and obtain by appropriate communication a set of maps from various political subdivisions, Boards of Election Commissioners or from any other appropriate source upon which would be drawn accurate lines to reflect the districts established by the General Assembly in its description of geographical areas in the 1967 legislation.

The schedule for the deadline for obtaining and marking the maps will be stated later so that the time schedule will appear in one place in this record.

It is anticipated that the maps will be presented either to Mr. Hungate or to some person designated by him together with a joint request of all parties appropriately made in conjunction with any existing protocol, known or unknown, to the Bureau of the Census to seek its immediate aid in allocating the 4,319,813 population of the State of Missouri into the ten congressional districts established by the Missouri General Assembly in its 1967 Reapportionment Act.

It is further agreed that after this data is obtained from the Census Bureau, the parties will meet and prepare a stipulation of fact which will appropriately present an agreement on the population figures in a manner substantially the same as the parties were able to agree in connection with the 1965 litigation.

Additional documentary evidence will be included in that stipulation and such documentary evidence will include the full legislative history of the bill ultimately enacted into law, including any amendments made in committee or otherwise, together with any constitutional protests or any other documentary evidence that might relate thereto.

Included in the stipulation will be like data reflecting the legislative history of any and all other bills introduced in the 74th General Assembly of Missouri that proposed redistricting for the State of Missouri.

In the event either party proposes additional documentary evidence for inclusion in the stipulation and objection is entered to such evidence, the proffering party shall promptly call the Court's attention to the problem thereby presented and this Court, after appropriate consultation with my brothers, will give further directions in connection with whatever the problem may be.

The time schedule regulating further proceedings will be as follows:

The maps will be collected and marked not later than September 29, 1967, in order that appropriate transmission may be made by airmail or otherwise to Washington on Monday, October 2, 1967.

The stipulation concerning population and other documentary evidence above referred to shall be prepared and executed on or before October 9, 1967. This date is intentionally set on a Monday in order to permit counsel to work over the weekend on preparation of the stipulation.

The Attorney General has agreed to file written notice on October 9 as to whether he wishes to adduce any evidence in addition to that which has been subject to the above-mentioned stipulation.

If the Attorney General indicates that he does desire to introduce other than documentary evidence, he shall prepare, serve and file a list of the witnesses to be called, together with a short summary of the testimony he intends to adduce by such witness. It is anticipated in this connection that the parties may be able to agree to some facts that

might be supplied only by oral testimony and the Court is confident that appropriate request and the consistent courtesy and cooperation that has been the rule in this case will be extended between counsel in that connection.

In the event the Attorney General indicates that the case will be submitted on the stipulation, then this case will be processed in substantially the same procedural manner as was followed in connection with the 1965 case in which all of the evidence was subject to stipulation.

All parties have indicated that in the event all factual data may be stipulated, that none of the parties, including the intervenors, desire oral argument. In the event no oral argument is held, the following schedule of briefs is established pursuant to the agreement of counsel:

The Attorney General's and Intervenors' brief to be filed on or before October 27, 1967.

Plaintiffs' answer brief to be filed on or before November 13, 1967.

Attorney General's and Intervenors' reply briefs, if desired, shall be filed on or before November 24, 1967.

In the event this alternative is followed, it is agreed that the case shall be considered submitted and under advisement upon receipt of the final brief.

In the event the Attorney General indicates a desire for further evidentiary hearing, and prepares, serves and files his list of witnesses, all parties will simultaneously file trial briefs on or before October 19, 1967. That date is designated in order to give the three-judge court an opportunity to study the trial briefs of counsel prior to the evidentiary hearing which will be set and is now set for October 23, 1967.

In the event an evidentiary hearing is held on October 23,

1967, the Court is confident that the parties will be granted leave to file supplemental briefs in which they will be given appropriate opportunity to discuss the evidence adduced at the evidentiary hearing. It is, of course, impossible at this time to set that schedule because of the inability to anticipate exactly what evidence might be adduced.

In further regard to the possible evidentiary hearing and the requirements that the Attorney General prepare, serve and file his list of witnesses on or before October 9, 1967, it is appropriate that counsel for the plaintiffs prepare, serve and file a similar list of witnesses they might call on or before October 16, 1967.

The provision for listing the witnesses and indicating a short summary of the testimony to be adduced by those witnesses is designed to aid counsel in preparation for the hearing should one be held and to enable counsel to prepare for such cross-examination that they may wish to conduct at the possible evidentiary hearing.

Counsel are requested to file the original of all of the required filings with the Clerk of the Court at Kansas City, Missouri. The Court will take the file in this case and keep it deposited with the Clerk of the Court so that Mr. Truman will be able to handle all the filings.

In order that the members of the three-judge court have a full set of the briefs as they are filed, counsel are requested to forward a copy of their filings to Judge Mathes at his chambers in the United States Court House in St. Louis, Missouri, and copies to Judge Collinson's chambers and my chambers in the Western District of Missouri, United States Court House at Kansas City.

Gentlemen, I have attempted to follow the notes as I made them, and are there any additional suggestions that anyone

has made or did I misspeak myself in stating what I understand are agreements? Any additions, Mr. Preisler?

MR. PREISLER: Off the record.

(Short discussion off the record.)

THE COURT: Any additional suggestions from anyone?

MR. COLLINS: No.

MR. DOWNEY: I think the Court has accurately stated the thing, Judge. I have nothing to add.

THE COURT: I take it then from your suggestion of no additions, that the procedure and the directions contained are satisfactory to the plaintiffs, Mr. Preisler?

MR. PREISLER: That is right.

THE COURT: And to the Attorney General?

MR. DOWNEY: Yes, Judge.

THE COURT: And to the Intervenors?

MR. COLLINS: Yes, sir.

THE COURT: Very well. Now, I would like to also put of record the helpful suggestions made off the record that if the various steps can be moved faster by the continued cooperation of counsel, that you simply move up the deadlines on the next step, which will give you additional time for the preparation of your next filing, whether it be a brief or otherwise, and I am certain that counsel will continue the excellent cooperation that has been evidenced here today, and I want the record to show not only my appreciation but the appreciation both of Judge Mathes and Judge Collinson.

Anything further that need be done as far as this case at the present time?

MR. PREISLER: No.

MR. DOWNEY: No, Judge.

THE COURT: Mr. Collins?

MR. COLLINS: No, sir.

THE COURT: Thank you very much, gentlemen. I think we have designed some procedures that get at the fact.

Let me make an additional short statement for the record. I would like to add for the record a statement that I advised counsel that I would make on the record and to direct their particular attention to particular portions of the three-judge decision which is the law of this case. I am referring to 257 F.Supp. 953, and particularly to Page 969 in which the Court commented that, "The intervenors and the defendants were equally disinterested in what factors other than population were taken into account by the 1965 Missouri General Assembly. Counsel did not attempt to suggest any reason why it was not practicable to avoid variances," and then there is an analysis of an example of the variation between the first and the tenth district.

On Page 975 of that opinion the Court quoted from the three-judge court in the North Carolina Congressional Redistricting which was affirmed by the Supreme Court in April of 1966, in which that Court held that, "Most significantly, that court held that no valid explanation is offered to justify these glaring discrepancies, if indeed they could be justified; the plaintiff having proven his charge of discrimination on the basis of population by evidence to which the parties have stipulated, the burden was placed upon the defendants to justify the variations from this standard which were shown to exist. The defendants have failed to meet this burden and we are forced to the conclusion that the plaintiff and those in his class are entitled to relief."

The Maryland Redistricting cases were cited, and this Court in italics quoted from the first Maryland case on Page 976 of 257 F.Supp., and we placed in italics the language that, "When the mathematical imbalance between districts is of sufficient magnitude the burden shifts to the defendants to justify the disparity."

Quoting from Chief Judge Sobeloff's opinion in 253 F.Supp. 731, a still later Maryland Congressional case, also affirmed by the Supreme Court of the United States, and again using italics we quoted the language of Chief Judge Sobeloff, that, "There is no showing in this case that the difference of one-third is unavoidable or justified upon any legally acceptable ground."

I directed attention of counsel off the record and now do so on the record to the language in **Swann v. Adams**, 385 U.S. 440, decided by the Supreme Court of the United States on the same day that the opinion in this Court was affirmed, in which the identical language that this Court italicized in its 1965 Congressional case was quoted and relied upon by the Supreme Court of the United States as the applicable rule in that legislative reapportionment case. I know counsel are familiar with the principle that greater latitude of variance is permissible in a State legislative case arising under the Fourteenth Amendment than that commanded by a specific article relating to the congress and required under congressional statute in the congressional cases.

I called counsel's attention, and for the record do so again, to the Supreme Court holding in **Swann v. Adams**, where on Page 443, the Supreme Court held that, "We reverse for the failure of the State to present or the District Court to articulate acceptable reasons for the variations among the populations of the various legislative districts with respect to both the senate and house of representatives."

Skipping a reference to **Reynolds v. Sims**, the Court continued, "De minimis deviations are unavoidable, but . . . none of our cases suggests that differences of magnitude will be approved without a satisfactory explanation grounded on acceptable state policy."

In reliance upon **Roman v. Sincock**, the Court quoted with approval that "The Constitution permits such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination."

On Page 445 the Supreme Court held that, "As this case comes to us we have no alternative but to reverse. The District Court made no attempt to explain or justify the many variations among the legislative districts. As for the State, all it suggested in either the lower court or here is that its plan comes as close as 'practical' to complete population equality and that the State was attempting to follow congressional district lines. There was, however, no attempt to justify any particular deviations, even the larger ones, with respect to either of these considerations. Moreover, the State's brief states only that the legislature followed 'in most instances' the congressional boundaries, and with respect to 'practicality' it seems quite obvious that the State could have come much closer to providing districts of equal population than it did."

The Court commended the State for its admirable candor in conceding that it had offered no evidence in the District Court to explain the challenged variations, but it then held that no showing having been made, and relying upon Chief Judge Sobeloff's opinion, which we italicized in our 1965 case, that there was no showing that the differences were either unavoidable or justified upon any legally acceptable ground.

Now, I want to make clear on the record, as I attempted

to make clear off the record, that I do not suggest in any way that I have anything other than an open mind on the question of whether or not the sole defense thus far presented to this Court by the Attornel General is based totally and completely upon the legal proposition that the variations are within the doctrine of de minimis.

Isn't that a fair statement, Mr. Downey?

MR. DOWNEY: That is the sole issue that we have raised in our motion.

THE COURT: I suggested off the record that this was not dissimilar from the candor of the State and equally commendable, and I commend counsel as did the Supreme Court, for sharply focusing the issue in the 1965 case where the concession was made as I think it was made initially in the 1963 Act, that if population alone was the rule of decision in **Westberry v. Sanders** and if **Westberry v. Sanders** was controlling, that there was no question that the 1965 reapportionment was constitutionally invalid.

Now, in somewhat similar fashion, it is obvious that there are variations, the exact extent of which we cannot now tell, because of the difficulty with the figures that are discussed in this pre-trial, but that there are variations, and the State's present position is that the 1967 plan is immune from constitutional attack, indeed it is consistent with the command of the Constitution, because the variations, whatever they may be, do fall within the saving of a proper application of de minimis.

Now, I again do not suggest and do not in any way attempt to insist that the Attorney General consider this as an invitation to either refrain from adducing evidence or to adduce evidence. I think the provisions made in the order will permit counsel to make that judgment and to indicate what its judgment is with full knowledge that neither this

one judge of a three-judge court or any of my brothers are attempting to tell counsel for either side how they should run their lawsuit. Our interest is to obtain the facts, to properly apply the law, as we would in any other case that it is our duty to decide.

Now, any additional suggestion that counsel for either side would like to make either in connection with what I have just stated or anything else?

Mr. Preisler, do you have anything to add?

MR. PREISLER: No, sir.

THE COURT: Mr. Downey?

MR. DOWNEY: Judge, I think it is clear from what you have said that although our motion is founded entirely on the theory that the present congressional districts fall within a de minimis doctrine, that the issue of the justification variations by factors incident to a rational State policy are inherent in this case, in the event that the Court should find that the districts do not fall within the doctrine of de minimis, and as I have told the Court, I do not anticipate at this time that production of evidence on the issue of rational State policy to explain the variations, but when October 9 comes around, when we have had an opportunity to give this matter further consideration, we may reach a position to adduce evidence.

THE COURT: Oh, yes, you correctly anticipate in what I am sure I would be joined in by my brother judges, if you would care to file even an amended motion, simply do so; on October 9 this is ample time to enable everyone to fully prepare for any evidentiary hearing that you would like, and I have never checked the question of whether or not the Rules of Civil Procedure are totally applicable to a three-judge court, but I am inclined to think they are, and I am

certain that all trial judges in the Western District of Missouri are completely liberal in permitting amendment of any pleading for good cause shown and speaking for myself there would certainly be good cause if you cared to amplify and to put a second string in your bow as far as your present position that a proper application of de minimis requires a determination that the 1967 Act is constitutional.

If you want to put an alternative string in your bow that even if you are not right about that, nevertheless there are legally justified reasons to explain the disparities as we finally determine what they may be. So you rest assured that if you want to amend your motion, leave will be granted.

Anything additional from intervenors?

MR. COLLINS: No, sir.

THE COURT: Very well. Again thank you very much, gentlemen. (12:40 PM)

(REPORTER'S CERTIFICATE OMITTED IN PRINTING)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

EXHIBIT NO. 24

Clayton, Missouri
September 27, 1967

The undersigned, O. F. Moehle, Director of Elections, Board of Election Commissioners, St. Louis County, Missouri, hereby certifies as follows:

The boundaries of the following townships of St. Louis County have not been altered since the 1960 census:

Clayton
Concord
Creve Coeur
Gravois
Hadley
Jefferson
Lemay
Lincoln
Meramec
Midland
Normandy
Washington

The boundaries of the following townships have been altered since the 1960 census:

Airport
Bonhomme
Ferguson (New)
Florissant

St. Ferdinand
Spanish Lake (New)

Maps of townships that have been altered, namely, Airport, Bonhomme, Ferguson, Florissant, St. Ferdinand, and Spanish Lake, are submitted herewith.

The precincts in Bonhomme Township which are a part of the 2nd Congressional District as designated by the 1967 Act of the Missouri General Assembly are the following: 1, 2, 3, 6, 7, 8, 19, 41, 48, 59, 77, 89, 90, 91, 93. The boundaries of these precincts have not been altered since the enactment of the 1967 Act.

The remaining precincts of Bonhomme Township are part of the 8th District as designated by the 1967 Act.

Map of Bonhomme Township shows the township boundary in blue and the boundary between the 2nd and 8th Districts in red.

Descriptions of the precinct boundaries of the six altered townships are also submitted herewith.

/s/ O. F. Moehle

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

(TITLE OMITTED IN PRINTING)

STIPULATION OF EVIDENCE.

Plaintiffs, Defendants and Intervenor-Defendants stipulate and agree that the Court may consider the following evidence in the case herein pending:

1. Senate Bill No. 107, 74th General Assembly of Missouri, with digest of legislative history;

2. House Bill No. 399, 74th General Assembly of Missouri, with digest of legislative history;

3. House Bill No. 449, 74th General Assembly of Missouri, with digest of legislative history;

4. House Bill No. 870, 74th General Assembly of Missouri, with digest of legislative history;

5. Senate Bill No. 182, 74th General Assembly of Missouri;

6. Senate Committee Substitute for Senate Bill No. 182, 74th General Assembly of Missouri;

7. [Perfected] Senate Committee Substitute for Senate Bill No. 182, 74th General Assembly of Missouri;

8. Senate Substitute for Senate Bill No. 182, 74th General Assembly of Missouri;

9. House Committee Substitute for Senate Committee Substitute for Senate Bill No. 182, 74th General Assembly of Missouri;

10. Truly Agreed To and Finally Passed House Substitute for Senate Committee Substitute for Senate Bill No. 182, 74th General Assembly of Missouri;

11. Extract of Senate and House Journals pertaining to Senate Bill No. 182, 74th General Assembly of Missouri;

12. Map of Missouri Legislative Districts, House of Representatives, State of Missouri, as filed with James C. Kirkpatrick, Secretary of State of Missouri, by State Reapportionment Committee, March 31, 1966;

13. Letter, Director, Bureau of the Census, October 6, 1967; and enclosure listing 1960 population of Missouri Congressional Districts as established by the 74th General Assembly of Missouri;

14. Map of Missouri, population of counties, 1960 census;*

15. Map of St. Louis by ward and precinct boundaries, 1966, Board of Education Commissioners for the City of St. Louis;

16. Map of St. Louis by ward and precinct boundaries, 1966, Board of Election Commissioners for the City of St. Louis, showing 1960 population for each ward;*

17. Maps of individual city wards, St. Louis, Missouri, Board of Election Commissioners, 1966;

18. Letter, Director, Bureau of the Census, January 18, 1967, listing 1960 population of wards in St. Louis City, Missouri;*

19. Map of City and County of St. Louis, Copyright—Wunneberg Engineering Company, Overland 14, Missouri;*

20. Map of townships, St. Louis County, Missouri, St. Louis County Planning Commission, 1965, showing 1960 population for each township;*

21. Map of St. Louis County Townships, 1966, Board of Election Commissioners, St. Louis County;

22. Maps of individual townships, St. Louis County, St. Louis County Board of Election Commissioners, 1966;

23. Letter to State Senator Robert A. Young from Joe D. Kolb, Chief, Geographical Operations Branch, Bureau of the Census, Jeffersonville, Indiana, February 14, 1967, listing 1960 population for townships in St. Louis County, Missouri;

24. Certificate of Mr. O. F. Moehle, Director of Elections, Board of Election Commissioners, St. Louis County, Missouri, September 27, 1967;

25. Map of Kansas City by wards and precincts; Board of Election Commissioners, Kansas City, Missouri, 1965;

26. Maps of individual city wards, Kansas City, Missouri, Board of Election Commissioners, 1965;

27. Jackson County Street Map, Copyright—Gallup Map and Stationery Company, showing 1960 township populations;*

28. Kansas City, Missouri, Annexation Map, Director of Planning, Kansas City, Missouri, 1966;

29. Exhibits filed in Preisler et al. v. Secretary of State et al., No. 923; and Childs et al. v. Secretary of State, No. 924, United States District Court, Western District of Missouri, Central Division;**

30. Eection and population data in the Blue Books or Official Manuals of the State of Missouri from 1960 to-date and the official publications of the United States Department of Commerce, Bureau of the Census from 1960 to-date.

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*Obtained from files of State Representative Fred E. Copeland, Chairman, House Committee on Congressional Redistricting, 74th General Assembly of Missouri.

**Plaintiffs' Exhibits in Cases 923 and 924:

#1. United States Bureau of the Census, United States Census of Pop-

ulation 1960, Number of Inhabitants, Missouri Final Report PC(1)-27A, U. S. Government Printing Office, Washington, D. C., 1961.

#2. United States Bureau of the Census, United States Census of Population, 1960, General Population Characteristics, Missouri. Final Report PC(1)-27B, U. S. Government Printing Office, Washington, D. C., 1961.

#3. 1960 Census of Population, Supplementary Reports June 16, 1961, PC(S1)-6, "Population of Cities of 10,000 or more by wards, 1960."

#4. (From the Official Manual State of Missouri 1961-1962, p. 1470.)

#5. (From the Official Manual, State of Missouri 1961-1962, p. 238.)

#6. Map of St. Louis Congressional Districts by ward and precinct boundaries, July 1961. Board of Election Commissioners for the City of St. Louis.

#7. United States of the Census, United States Censuses of Population and Housing, 1960. Census Tracts, Final Report PHC(1)-131. U. S. Government Printing Office, Washington, D. C., 1962.

#8. United States Bureau of the Census, United States Censuses of Population and Housing, 1960. Census Tracts. Final Report PHC(1)-70, U. S. Government Printing Office, Washington, D. C., 1962.

#9. United States Bureau of the Census, United States Census of Housing, 1960, Vol. III, City Blocks. Series HC(3), No. 232. U. S. Government Printing Office, Washington, D. C., 1961.

#10. United States Bureau of the Census, United States Census of Housing, 1960, Vol. III, City Blocks, Series HC(3), No. 230. U. S. Government Printing Office, Washington, D. C., 1961.

NORMAN H. ANDERSON
Attorney General

/s/ THOMAS J. DOWNEY
First Ass't. Attorney General

/s/ LOUREN R. WOOD
Assistant Attorney General.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

(TITLE OMITTED IN PRINTING)

TRANSCRIPT OF PROCEEDINGS.

BE IT REMEMBERED that heretofore on Monday, the 23rd day of October 1967, the above-entitled cause came on before the HONORABLE M. C. MATTHES, Judge of the United States Court of Appeals; the HONORABLE JOHN W. OLIVER and the HONORABLE WILLIAM R. COLLINSON, Judges, United States District Court for the Western District of Missouri, sitting at Jefferson City, Missouri, and the following proceedings were had and entered of record:

The plaintiffs were represented by Mr. Paul W. Preisler, 4274 Shenandoah Avenue, St. Louis, Missouri.

The defendants were represented by Mr. Thomas J. Downey and Mr. Lorian Wood, Assistant Attorneys General, State of Missouri.

The intervenors were represented by Mr. David Collins, 107½ North Rollins, Macon, Missouri.

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JUDGE MATTHES: Gentlemen, this morning we have scheduled the case of Paul W. Preisler and others against the Secretary of the State of Missouri and the Attorney General of Missouri, F. V. Heinkel, Jr. and others, intervenors.

May we have the appearances, please? Mr. Preisler, I take it you are representing yourself and other plaintiffs?

MR. PREISLER: That is right.

JUDGE MATTHES: And whom do we have for the State?

MR. DOWNEY: May it please the Court, Norman H. Anderson, appearing by Thomas J. Downey, Assistant Attorney General, and Lorian R. Wood, Assistant Attorney General.

JUDGE MATTHES: And, Mr. Collins, I assume you are representing the intervenors?

MR. COLLINS: Yes, sir.

JUDGE MATTHES: It is the Court's understanding that

the parties desire to introduce some evidence. Is that the correct understanding?

MR. DOWNEY: Yes, Your Honor.

JUDGE MATTHES: Very well, you may proceed. I take it from a letter received from Mr. Preisler that there is going to be some objections to the evidence being offered, and at the appropriate time, Mr. Preisler, you may make whatever objection you think should be made.

I might say, of course, this matter is before the Court, and while the Court is of the opinion that you are primarily concerned with the legal question, we certainly don't want to cut off the right of the parties to offer evidence if they have any which may be pertinent to the issue before the Court.

I think we are going to permit the witnesses to testify, subject to objection, of course, and then when the Court considers the matter, we can rule out incompetent evidence or wholly irrelevant evidence.

So with that understanding, you may proceed, Mr. Downey. Call your first witness.

MR. DOWNEY: Thank you, Your Honor. We would like to call the Honorable Richard Rabbitt as our first witness.

RICHARD J. RABBITT,

called as a witness on behalf of the defendants, was duly sworn and testified as follows:

DIRECT EXAMINATION

BY MR. DOWNEY:

Q. Please state your name and address for the record. A. My name is Richard J. Rabbitt, R-a-b-b-i-t-t. My address is 4340 Forest Park Avenue, St. Louis, Missouri.

Q. What is your occupation, Mr. Rabbitt? A. My occupa-

tion, I am an attorney at law. I am a member of the Missouri General Assembly from the Eighth District.

Q. What is your academic background leading up to your professional competency? A. I attended St. Louis University. I have a Bachelor of Science degree in Political Science, Bachelor of Law degree from St. Louis University. I attended graduate school at St. Louis University for one semester, studying toward a Master's degree in Political Science, and I have practiced law for the past seven years and been a member of the General Assembly. This is my fourth term.

Q. When were you admitted to the bar in Missouri? A. I was admitted to the bar in 1960.

Q. How long have you lived in St. Louis? A. All my life.

Q. Prior to being elected to the General Assembly, have you held any other public offices? A. No, I have not.

Q. Do you hold any official position in the General Assembly other than a member from the district which you represent? A. Yes, I was elected at the Democratic caucus at the beginning of the Seventy-Fourth General Assembly to the position of majority floor leader. I still hold that position.

Q. Now, is this a party position or is this an office in the Assembly itself? A. It is a party position. It is a position of the Democratic party, and you are elected at a caucus of Democratic members.

Q. Mr. Rabbitt, would you explain to the Court what the duties of the majority leader of the House are? A. Well, the duties of the majority leader are not exactly set out in any of the rules, but through custom and useage, it is generally the duties of the majority floor leader to set the schedule of the General Assembly; usually makes the motions to adjourn and recess, and so on, so as to set up the working times for

the House of Representatives, and also to a large extent determines what calendar will be taken up by the membership. So that he controls to a certain extent the schedule of the House of Representatives in regard to what bills will be taken up, and also he has the primary responsibility for the administration's program, seeing that the administration program is passed, the bills that the Governor recommends. Also, I might add, he has responsibility for leading the Democrats on the floor of the House in opposition to the minority party; in other words, if the minority party has certain arguments, and so on, against administration policy, it is usually the majority leader's duty to speak against these arguments, and so forth, defend the administration.

Q. Is the Democratic party at the present time the majority party in the General Assembly? A. That is correct.

Q. What is the division in the parties in the House? A. There are 107 Democrats and 56 Republicans. I could be one off there.

Q. There is a total membership— A. We have 163 members, and then we have 107 to 56.

Q. Now, you spoke about certain duties you have in connection with the various calendars. Explain what the various calendars are, if you will, sir. A. Well, in the House we have —as far as the basic calendars that are used for work, we have the perfection calendar, the House bills for perfection. Do you want me to explain how they are used?

Q. If you could, briefly. A. The House perfection calendar, bills are placed on the House perfection calendar when they come out of the House Committee. In other words, a bill is introduced, it is referred to a committee; if it is voted out favorably by the Committee it goes to the House perfection calendar. At the perfection stage, a bill can be amended. It is debated; it is brought up, it is debated and it can be

amended, and when finally debates are finished, all the amendments are offered or defeated, than it is voted on whether it shall be perfected or not. If it is voted to be perfected, then the bill goes to the printer and is reprinted with all the amendments incorporated within it and distributed to the members, and then it goes to the third reading calendar, House bills for third reading.

Now, these are the formal calendars I am talking about. There is House Bills for Perfection formal calendar, and the reason—we have a formal calendar and an informal calendar in the House. The formal calendar, bills go on the formal calendar ordinarily in the order in which they are reported out of Committee. If a bill is reached and the member who is sponsoring the bill does not wish to take up the bill at that time, the bill is usually placed on the informal calendar for perfection.

The same way with third reading. We have a third reading calendar. After a bill is perfected, it is put on the third reading calendar, and it is put in in the order in which it comes back from the printer after the bill is perfected. It is reported out of Committee on bills perfected.

We have the informal calendar in which the bills are placed; usually if we get to the place where this bill should be brought up, if the sponsor does not want to bring it up, we can place it on the informal calendar, third reading, and it can be brought up at the time we go to that calendar.

These are basically two calendars in regard to House bills. We also have a House calendar of House bills with Senate amendments. This is if a bill passes the House, is sent to the Senate and it is amended, comes back to the House, the House has to either accept the amendment or refuse to accept it. These bills are placed on a separate calendar.

Then we have the formal and informal calendar of Senate

bills for third reading. We do not have to perfect Senate bills when they come over to the House. They can be amended and passed at the same time. So if a Senate bill is passed by the Senate, sent over to the House and reported out favorably by House Committee, it is usually put on the formal calendar of Senate bills for third reading, and again if the sponsor does not want to take it up when it is reached, it can go over to the informal calendar.

Then we also have special orders of business, and usually appropriation bills and bills which are of great importance, we feel are of more importance than the ordinary bills, by vote of the membership we can set that up as a special order of business, and it is on a separate calendar, and it is taken up whenever the membership has voted to take it up. In other words, that is what we did on this particular bill, we set it up as a special order of business, the redistricting bill.

Q. Do I understand, Mr. Rabbitt, the present General Assembly in the State of Missouri is the Seventy-fourth General Assembly? A. That is correct.

Q. And do I further understand that the Seventy-fourth General Assembly met in regular session in January of 1967 and adjourned June 30th of 1967? A. That is correct.

Q. How many House bills were introduced in that regular session of the General Assembly? A. I don't have the exact number, but there were over 800, I know that, close to 900 bills.

Q. Approximately how many House bills were actually passed by the House and sent to the Senate for action?

JUDGE OLIVER: Mr. Downey, would you enlighten me as to how this general information is relevant and pertinent?

MR. DOWNEY: Your Honor, I am making a record here in the event this case should go on to the Supreme Court of

the United States, in order that that Court might be able to view the action of the General Assembly on this particular bill in the context of the other business that was before the General Assembly at its regular session of the Seventy-fourth session, and the impression could very easily be made that the General Assembly had six months to act on this question of redistricting, and the truth of the matter is, the General Assembly, insofar as the House is concerned, acted on 800 bills within that House itself, and that it did not have six months to devote its attention to this issue or this issue primarily, that there were many major issues before the General Assembly.

I don't intend to dwell upon this at any great length; in fact, my line of questioning in that regard is practically completed now.

JUDGE OLIVER: Well, is it your general theory that the General Assembly did not have sufficient time to properly consider this matter?

MR. DOWNEY: No, Your Honor, it is not.

JUDGE MATTHES: If you have the information, Mr. Downey, as to the number of bills passed by the House and Senate, why don't you just make a statement? I don't suppose anyone would controvert that.

MR. DOWNEY: Well, I don't have, Your Honor, and I thought this witness could tell us very readily.

JUDGE MATTHES: Very well.

A. I don't have the exact figures of how many bills were passed. I could give you an idea. I believe that the House must have passed 600 bills, around 300, that I would think they went over to the Senate. Now, as far as finally enacted bills, I think the Senate enacted somewhere around 150. I don't have that exact figure. I know there were less than 300

bills enacted completely, and the number of Senate bills and House bills are about even at this time, so I would think they passed around 300, and about half of those were finally passed by the Senate.

Q. Now, in your testimony you said that you had some major responsibility in guiding administration measure through the House. Is that right, sir? A. That is right.

Q. Did congressional redistricting become a question of major importance to the administration in the Seventy-fourth General Assembly? A. Well, I would say that it was a question of importance in that it was necessary to pass a bill rather than to have the congressmen run at large. I think the administration was interested in seeing that a bill was passed, but the administration, in the form of the Governor, made no recommendations personally to me about any particular bill being passed or any particular type of districts. In other words, they were just interested in seeing that a bill was passed, but the administration did not take an active part in trying to pass any special bill.

Q. The administration did want to avoid at-large election of congressmen in Missouri? A. That is right.

Q. Now, Mr. Rabbitt, there has been stipulated in evidence in this case that Senate Bill 182 was introduced in the Senate and that a Senate Committee Substitute for that bill was reported out on the floor of the Senate, and that this Senate Committee Substitute with perfecting amendments was passed by the Senate and came over to the House. It has also been stipulated into evidence that this bill was referred to the House Committee which was considering congressional redis[illegible]cting. It has also been stipulated that the House Committee reported out a House Committee Substitute for Senate Bill No. 182. A. That is correct.

Q. Now, prior to the reporting out of House Committee

Substitute for Senate Bill 182 by the Committee, did you have any duties in regard to this congressional redistricting legislation? A. I did not. I was not a member of the redistricting committee in the House.

Q. Well, after this bill came out of Committee onto the floor of the House, what duty, if any, did you have in regard to the handling of the House Committee Substitute for Senate Bill 182? A. I had no duties in regard to the handling of this bill. The only thing that I did was confer with the Committee chairman, Representative Copeland, who was going to handle the bill on the floor, as to a time to set it for special order of business so we could have adequate time to debate the bill. So we did make it a special order of business, and I think it was for June 14, but other than that, I had no duties. So it was the duty of the chaiman of the committee to handle the committee substitute on the floor and see that it was adopted.

Q. Describe, if you will, the legislative action in the House on this House Committee Substitute.

JUDGE MATTHES: Mr. Downey, isn't that covered by the stipulation?

MR. DOWNEY: Yes, Your Honor, it is.

Q. (By Mr. Downey) Well, the stipulation discloses, Mr. Rabbitt, that the House Committee Substitute, when it was taken up by the House and voted upon, was defeated, and I don't have the exact vote on that before me. It was defeated by a vote of 108 against, 53 for, and two either absent or not voting. Do you recall that vote, sir? A. Yes, I do. That is correct.

Q. Now, subsequent to the defeat of the House Committee Substitute, did that then place the bill that had come over from the Senate on the legislative calendar as the legislative

proposal on this subject before the House? A. That is correct, the Committee Substitute was defeated. The original bill came before the House, which was the bill that had been sent over from the Senate. Actually it had been amended in the Senate, but the bill as we received it from the Senate was before the House at that time.

Q. At that time did you undertake any particular duty in regard to the Senate Committee Substitute that was before the House? A. No, it is my understanding that Senator Avery, who had been the sponsor of the bill in the Senate, had requested Representative Rolwing in Mississippi County to handle this bill on the floor if the House Committee Substitute was defeated, so Representative Rolwing proceeded to handle this bill and attempt to get the original bill passed.

Q. The record discloses that numerous amendments were offered to the Senate Committee Substitute which were defeated, and that this was on June 14, 1967. Now, in the course of the legislative action upon these various amendments, did you come to any decision as to what should be done procedurally in regard to the calendar concerning this particular piece of legislation? A. Yes, it came to my attention that because of the many amendments that were offered and through talking to various members, that it was thought that there should be some changes in this Senate bill to improve it; it seemed to me also that the general tenor of the House was not to adopt these amendments piecemeal because it might throw the population figures out, so I took the position after a caucus and talking to various members that we should recess until the following week and try to come up with perhaps a substitute bill which would embody some of these amendments but which also would keep the population figures in line.

Q. Was this in fact done? A. Yes, I made a motion that

we postpone further consideration of the bill until the following Monday, which I think was the 19th.

Q. Then what happened in this three or four—

JUDGE MATTHES: Mr. Downey, the Court has no desire to cut you off at all, but I am wondering if all of this isn't covered in your stipulation. We have copies of all the bills, and the legislative history seems to be set out rather fully in the stipulation. If the witness can enlighten the Court on any pertinent matters, of course we will be glad to hear him or any other witness, but in the final analysis, I suppose we are bound pretty much by the stipulation, or any court would be bound by the legislative history that is here.

MR. DOWNEY: Thank you, Your Honor.

Q. (By Mr. Downey) Now, the record discloses, Mr. Rabbitt, that on June 19th a House Substitute for the Senate Committee Substitute was offered by you. A. That is correct.

Q. Were you the author of the Substitute? A. I was actually not the author of the Substitute. As I mentioned before, we had recessed to give various members of the House an opportunity to try to get together with the other members and tie all their amendments into a bill, a substitute bill. We thought that the tactic was that a substitute bill would not —we could satisfy the membership, if they could agree on a substitute bill, then there would be no amendments to it, it would either be adopted or defeated, and if it were adopted we thought there would be a good chance that the Senate would take it also and we could get a bill passed. This is what we were aiming for, was to try to get a bill passed before the end of the session.

Q. Then you sponsored the bill as a service, in your position as majority leader, is that right? A. Yes, I was requested to handle the bill. They thought that the position

as majority leader might add a little more force or prestige to getting the bill passed.

Q. You have before you a map from your files that you used in sponsoring this substitute bill. A. Yes, I do.

(HEARING DEFENDANT'S EXHIBIT A WAS MARKED FOR IDENTIFICATION)

Q. Mr. Rabbitt, do you also have before you a written memorandum in regard to certain population figures that you used in the sponsorship of the bill? A. Yes, I do.

JUDGE OLIVER: Are we talking now about House Committee Substitute for Senate Committee Substitute for Senate Bill 182?

MR. DOWNEY: Your Honor, we are talking about House Substitute for Senate Committee Substitute for Senate Bill 182.

JUDGE MATTHES: That is the one that was finally passed?

MR. DOWNEY: Yes, Your Honor.

JUDGE MATTHES: It is Exhibit No. 10.

(HEARING DEFENDANT'S EXHIBIT B WAS MARKED FOR IDENTIFICATION)

Q. (By Mr. Downey) I hand you what has been marked for identification Exhibit HD, Defendant's A and B, and are these the map and the memorandum which you have referred to in your earlier testimony? A. That is correct.

Q. Now, I note from figures on both of these exhibits, there are figures in red and then there are figures in pencil and in pen where some figures appear to have been changed. Explain what these various figures are, if you will, sir. A. Well, the figures in red were—I believe they were writ-

ten in by Representative Earl Sponsler's secretary. This group of representatives I mentioned before had met, drawn up the substitute bill; I believe she typed up the bill in order to have it mimeographed and distributed. I wanted to have a map showing the districts and populations and so on, so that I could find out if this bill would have support, and this was the map that was handed to me by either Representative Sponsler or his secretary, showing the figures that they had come up with in totalling up the various districts. These were the red marks. Now, the ink marks are my own; this is my own handwriting; and after checking over the districts and the map, I found that they had omitted one change that we had made between the First and the Third District, which involved four precincts in the Fifth Ward, Precincts 1, 2, 19 and 20 of the Fifth Ward, and these were transferred from the First District to the Third. They had been in the First District in the Senate Bill. And so this made a difference of approximately 6,000. So the figures I changed were these figures of 442,000 to 436,000, and the other figures of four-hundred-twenty-five to four-hundred-thirty-one. I just added six-thousand-some-odd people to the Third District subtracted from the First District. There are some other figures here, but I don't recall exactly what those were for. They are in pencil. I think perhaps I was just jotting down numbers while we were debating the substitute.

JUDGE MATTHES: Mr. Downey, again I am wondering about the relevancy of this. The parties have stipulated that the 1960 census population controls.

MR. DOWNEY: Yes, Your Honor.

JUDGE MATTHES: And I have a little difficulty in seeing the relevancy of this.

MR. DOWNEY: I think from the testimony the witness has just given, Your Honor, he has shown that these changes

which the Committee made and changes that he made after the informal committee had submitted it to him, reflected in bringing the populations of two districts much closer together, and I was attempting to show that this was the legislative attempt, was to approach equality in population.

JUDGE OLIVER: Let me get clear, regardless of the question of relevancy, is this map in connection with House Committee Substitute for Senate Committee Substitute for Senate Bill No. 182, which is Exhibit 9 attached to the stipulation, or is this map somehow related to Exhibit 10, which is the House Substitute for Senate Committee Substitute for Senate Bill No. 182?

THE WITNESS: Your Honor, if I could answer that—

JUDGE OLIVER: Yes, I would like to know.

THE WITNESS: It is the latter. It is the House Substitute. This exhibit embodies the provisions of the House Substitute for Senate Committee Substitute for Senate Bill.

JUDGE OLIVER: Let me ask you this question then. Your House Committee Substitute for Senate Committee Substitute, which is Exhibit 9 in this record, for example, proposed a Tenth District, which included Dent County, and which would have had a variance of less than 2,000 population. The bill as ultimately passed in No. 10 moved Dent County out of the Tenth District and placed it in the Eighth. Can you tell me the circumstances and the reasons why in the process which you are describing that legislative decision was made?

THE WITNESS: Your Honor, I can't tell you exactly why that particular change was made. Let me just say that taking the two bills together, which I think we have to do—since I wasn't on the Committee, I don't know why they made the change in the Committee, but taking two bills

together, the Committee Substitute, for many reasons apparently, was rejected by the House and—

JUDGE OLIVER: What were the reasons?

THE WITNESS: Pardon me?

JUDGE OLIVER: Were the reasons a matter of record?

THE WITNESS: I don't know exactly. I think in order to find this out, you would almost have to question each individual representative; each one apparently who would not support this had some reason that they didn't like this particular division or apportionment of the representation, but I don't know exactly why, but cumulatively it was rejected two to one; whereas, the substitute was adopted by a majority of the representatives, but I am sure that—I don't know, perhaps each had his own individual reason.

I think generally our intention was to try to get the population as near equal as possible, but how you get this population as near equal as possible was the big problem, and this is what different individual representatives disagreed on.

JUDGE OLIVER: Well, this was the reason why it occurred to me, because your House Committee did have the Tenth District within an equality of 1927 votes of the ideal, and your Committee also had the always troublesome Sixth District within 3511 votes, but in the shuffle illustrated by your map, the Sixth District moved away from that closeness of equality of population to a minus 9,743, and the Tenth District to a minus 8,113. The question naturally occurs as to whether equality of population was actually being sought.

THE WITNESS: Well, Your Honor, I don't have those figures, but if I recall correctly, I think also that we have improved some of the districts. Wasn't there one district

there that was higher than the highest district that we had in the substitute?

The highest district that we thought we had in the substitute was 442,000. I believe in that House Committee Substitute there was a district that had a larger number than that. I don't have those figures with me, but isn't there one that has 445?

JUDGE OLIVER: Is it a fair statement, Mr. Rabbitt, that your information as to the motivation of the members of the Committee, of which you were not a member, must necessarily be based upon what the members of that Committee told you about why the changes were made?

THE WITNESS: My testimony would have to be from—yes, just hearsay testimony.

JUDGE MATTHES: Mr. Rabbitt, in order that the record is clear on this point, neither the House nor the Senate records the debates on bills and on amendments, isn't that true?

THE WITNESS: That is correct, Your Honor, none of the testimony in the Committee or on the floor of the House has been recorded, to the best of my knowledge.

Q. (By Mr. Downey) It is also true, Mr. Rabbitt, that the Committees make no written reports as such? A. That is correct. They just make recommendation, do pass or do not pass, or send it back without recommendation. This was reported out to pass, the House Committee Substitute.

MR. DOWNEY: Your Honor, I offer into evidence Exhibits HD A and B.

JUDGE MATTHES: Any objection?

MR. COLLINS: No, sir.

MR. PREISLER: Your Honor, with regard to the exhibits in question, the origin of those exhibits was somewhat

doubtful, namely, who put the marks on and who computed the figures, where the source of the figures was that they used. There was no statement made as to whether they used the official census or whether they used some information they got at various points.

JUDGE MATTHES: It will be received, subject to the objection. The objection, of course, will be considered when the Court considers the case.

(HEARING DEFENDANT'S EXHIBITS A AND B WERE RECEIVED IN EVIDENCE)

Q. (By Mr. Downey) Now, Mr. Rabbitt, in the performance of your duties as majority leader, you necessarily have to determine constantly the concensus of the membership of the House in regard to administration measures that are pending before the House? A. Yes, I attempt to try to find out, yes, the concensus of the House on these measures and other measures.

Q. And are you constantly in touch with the members of the House in order to determine this concensus? A. Yes, I am.

Q. And was this true in regard to the consideration of this redistricting legislation from the time the House Committee Substitute first came out on the floor until the time the House Substitute for the Senate Committee Substitute was finally passed by the House? A. That is correct.

Q. And in determining this concensus, did you become aware of the considerations that the various members of the House were recognizing in regard to this legislation? A. Yes.

Q. First of all, let me ask you this, sir. What factor did you consider in proposing the House Substitute? What were you basing that House Substitute on? A. Well, the first factor, I think, that motivated everyone in the—

MR. PREISLER: Objection, Your Honor. I don't think he can state the effect on other people.

JUDGE MATTHES: I think it is objectionable.

A. The first fact that I would take into consideration was equal population, because I realize that if we didn't pass a bill that was as near equal in population as possible that it would be declared unconstitutional, and I certainly didn't want to do all this work in vain, so I think this was the first consideration, was to try to get the districts in as near equal population as possible, but also to be able to pass a bill; in other words, I could have probably got these within two or three voters, maybe, if we used a computer or something like that, but this would never pass the Legislature. We are dealing with men, and these men represent people at home, and I think they have to follow these people's wishes, so we had to try to adopt a plan that could get 82 votes in the House and 18 votes in the Senate.

Q. Did you give recognition to any other considerations? A. Yes, I think the other considerations we gave recognition to were that we wanted the districts to be as compact as possible, not try and string them out across the State. We also took into consideration, I think, some things such as the historical geographical situation, such that a county in particular—another thing I should interject here, another very important thing, I think; we tried not to break up rural county lines. We tried to keep the county line or the county as the basic unit, within most of these districts, which were out in the rural areas. We did split up St. Louis County, St. Louis City and Jackson County. I think those are the only counties that we did split up, and these were in large urban areas. So we tried not to break up the county lines, and we tried to, if possible, stick to historical useage of these counties in districts; in other words, if a certain county had his-

torically been in a district with other counties over the years, we tried to leave it in that county if possible, if it didn't throw the population off.

MR. DOWNEY: No further questions, Your Honor.

JUDGE MATTHES: Mr. Collins, do you have any questions?

MR. COLLINS: No questions, Your Honor.

JUDGE MATTHES: Mr. Preisler.

MR. PREISLER: If the Court please, I have sort of a general objection to the testimony of the members of the General Assembly, which I think is best illustrated by the testimony we have received from Mr. Rabbitt.

In a sense, the testimony of these individuals is self-serving, not only to himself, to his political party, to his political faction, political area and also his political career.

This is not an ordinary bill. This is one in which we have a lot of controversy. The mere fact that there might be bipartisan agreement does not cure the possible bias and prejudice of some of the individuals. We do not know what their testimony is. We do not know what they did in their own minds to get them finally to vote upon this.

There is also the question of separation of power here, the conduct of the legislature, how they behave, what is in the minds of these various people as they make up a bill, is not something that this Court should really inquire into, and there are no records of the committee, which I think is brought out; there is no records of the floor debate.

There is no possible way to determine the reasons nor the motives of these legislators, whether they were population-motivated or whether they had other motivation, and we could bring in 163 plus the 34 members of the Senate and

still this Court could not get necessarily what was on their minds when they voted for that bill, and I feel the Court will ultimately have to judge, at least in my opinion, and I think in the opinions that you find in some of the other courts, on the actual result of what they produced, not upon how it got there, and therefore I feel that much of this testimony, an example of what we have gotten so far, will merely give an idea what went on in the Legislature and a degree of speculation.

JUDGE MATTHES: Shall we consider this as a motion to strike the testimony? Is that what you are doing?

MR. PREISLER: I would take that as a motion to strike —although I do not like to keep this from the knowledge of the Court—

JUDGE MATTHES: The motion will be denied. We will give it such consideration as we think it is entitled to.

MR. COLLINS: May it please the Court, Your Honor, I thought of a couple questions I would like to ask. May I ask them?

THE COURT: Yes.

DIRECT EXAMINATION

BY MR. COLLINS:

Q. Representative Rabbitt, is it true that Fort Leonard Wood is located in the Eighth Congressional District? A. That is correct.

Q. And is it also true that there are approximately 40,000 soldiers at Fort Leonard Wood? A. That is my understanding.

Q. Many of whom are non-residents of the State of Missouri, isn't this true? A. That is right.

Q. And consequently ineligible to vote upon congressmen in Missouri? A. That is correct.

MR. COLLINS: That is all.

JUDGE OLIVER: Mr. Rabbitt, I have examined the Hearing Defendant's Exhibit No. A, and find that the figures on this map and the figures as corrected on your Hearing Exhibit B are the identical figures that were initially presented to this Court as an exhibit to the motion to set aside the pending injunction at a preliminary conference on September 26 in this case. The origin of those figures and the reason for the mistake was set out in some detail. I find, however, that the figures are identical and according to your testimony were the basis upon which at least the House made its estimates of what population in fact existed in the various districts that you were working with. Did you at that time know that the figures with which you were working did not correctly and accurately reflect the 1960 census figures?

THE WITNESS: No, I did not. I thought those were the correct figures, with the exception of maybe being off, you know, just a few votes, maybe a hundred votes or something like that. But they were the best figures that we had available to us at that time, and we were short of time.

JUDGE OLIVER: You did have available the 1960 census, did you not?

THE WITNESS: Yes, we did, Your Honor, but the problem, if I may state it, was in breaking up some of these township precincts in Jackson County and in St. Louis County. I think that is where the errors were made, and I believe the information that we obtained was from the Election Boards, and I don't recall exactly why, but at that time we were unable to get the exact figures from the Census Bureau, as to how many people lived in a certain precinct.

They don't use, you know, the precincts apparently as their basis of computing the population. They have a different type of district. So at that time—this was on the 19th of June —we had to adjourn by the 30th. Those were the best figures available to us.

JUDGE OLIVER: Well, Mr. Rabbitt, you didn't split a single precinct in the Sixth District, did you?

THE WITNESS: I don't think so, no.

JUDGE OLIVER: Your figures are 3,000 off, and it was represented to this Court and the Legislature obviously operated under the impression that you were placing 425,238 in this district, when in truth and fact you were only actually placing 422,238, and there is stipulated in this Court that there are numerous other errors in the figures that the Legislature was actually using.

THE WITNESS: Your Honor, I think as far as the Sixth District, the only thing I can think of there is there was just a mistake in addition. We did have the correct figures from the Census Bureau on that. It must have been a mistake in the addition there, because we don't split any counties there.

JUDGE MATTHES: Anything further from this witness?

MR. DOWNEY: I have one further question, Your Honor.

DIRECT EXAMINATION—continued

BY MR. DOWNEY:

Q. Mr. Rabbitt, based upon your experience as a member of the Legislature and based upon your experience as majority leader of the House, do you have an opinion as to whether this redistricting bill as enacted is a reasonable legislative compromise? A. Yes, I do have an opinion. I think that it is a reasonable legislative compromise.

MR. DOWNEY: Thank you, sir.

CROSS EXAMINATION

BY MR. PREISLER:

Q. Mr. Rabbitt, you said the districts were as nearly equal as possible, namely, that is what you felt you were aiming for, right? A. Yes.

Q. Did you examine the final map? A. Pardon me?

Q. Did you examine the final map of the districts? A. What do you mean by the final map?

Q. Well, the map finally, just before the passage of the bill when it was presented to the House? A. This map that we introduced into evidence, is that right? Is that what you are talking about?

Q. No, the map of the districts as were finally presented to the House. A. That is it. That map there is the one that I had.

Q. Are you then aware of the shift of a county here would greatly improve this as to the extent of perhaps lowering the difference between the maximum and minimum by as much as 15,000? A. I will say this, that there probably were changes that could be made that would do what you are saying, but I don't think a bill like that could have passed. This bill got 82 votes. If we made changes in it, we may not have gotten 82 votes. We may not have passed the bill. So it was more important that we pass a bill, the best possible bill, rather than to have an at-large election.

Q. But it is true that there was no attempt made by you to introduce changes that would have brought it closer? A. No, there was no attempt by me. I thought this was the best that we could pass.

MR. PREISLER: Thank you.

JUDGE MATTHES: You may step down, Mr. Rabbitt. Who is your next witness?

MR. DOWNEY: Your Honor, I overlooked when we commenced this morning, the deposition of Senator Omer Avery. Senator Avery was in Europe when this motion was filed and just returned to this country about ten days ago, and he had a matter set this morning that involved witnesses who were coming into the State of Missouri from the State of California, and he felt like it was very important for him to go ahead and proceed with those commitments.

So we took the deposition of Senator Avery last Friday, and because of these circumstances, he is not here as a witness this morning, and I would like to introduce into evidence the deposition of Senator Avery.

MR. PREISLER: Your Honor, I have just been given that this morning, but I will presume that the reporter correctly took it down.

JUDGE MATTHES: You were present at the deposition, Mr. Preisler?

MR. PREISLER: Yes. I have not checked it, but otherwise I will assume it is.

JUDGE MATTHES: It will be received, subject to the same objection you made a while ago, Mr. Preisler.

Court will be in recess for about five minutes and perhaps you can get your witnesses lined up so we will move along.

(Recess—10:00 to 10:10)

THE COURT: Your next witness, Mr. Downey.

MR. DOWNEY: Thank you, Your Honor. We call the Honorable William Baxter Waters.

WILLIAM BAXTER WATERS,

called as a witness on behalf of the defendants, was duly sworn and testified as follows:

DIRECT EXAMINATION

BY MR. DOWNEY:

Q. State your name and address for the record, please, sir. A. William Baxter Waters, Liberty, Missouri.

Q. What is your occupation, sir? A. An attorney.

Q. What is your academic background leading up to your professional competency? A. Bachelor degree from William Jewell College at Liberty, Bachelor of Arts degree at the University of Missouri at Kansas City.

Q. Have you been a licensed attorney in the State of Missouri? A. Since 1941.

Q. Do you hold any public office in the State of Missouri? A. I am a member of the Missouri Senate from the Seventeenth District.

Q. Senator, how long have you been in the Senate? A. I was elected to the Senate in November of 1956, sworn in January of 1957.

Q. Do you hold any office in that body? A. I am the majority floor leader of the Senate.

Q. Now, have you held any other office in the past in that Senate body? A. Other than chairman of committees, no.

Q. Will you tell us some of the committees that you have chairmanned? A. Oh, I was chairman of the Criminal Jurisprudence committee, committee on Economics, committee on Rules, committee on Parks, Conservation and Forestry.

Q. Senator Waters, have you received legislative awards

from various private sources since you have served in the Senate? A. One or two.

Q. Would you recite these awards for the record, please, sir? A. Well, my first term I received the Globe-Democrat award for the outstanding senator, then in 1964 and 1966 I received the award for the outstanding member of the Legislature.

Q. Prior to serving in the Senate, have you held any other public office? A. I was judge of the Probate Court in Clay County from 1946 until 1954.

Q. In addition to the public offices which you have held, have you been the head of various civic organizations? A. Yes, sir.

Q. Would you tell us what some of these organizations are, sir, and the position that you held? A. Oh, back years ago I was chairman of the County Red Cross; I was District Governor of the Lions, President of the Probate Judges Association, are some that occur to me.

Q. Senator Waters, you have heard Representative Rabbitt describe generally his duties as majority leader of the House. Does that recitation of his duties correspond generally with those that you have in the Senate? A. They are basically the same. Of course, because of the difference in size of the two houses, the jobs do vary some, but basically they are about the same.

Q. There are 34 members of the Senate, is that right, sir? A. Yes, sir.

Q. Now, Senator, last night I discussed this matter with you at some length, and at that time you expressed a desire to have a map of the State of Missouri shownig the districts as drawn by the Act under consideration here this morning, together with the population of the counties in the State of

Missouri, did you not, sir? A. If I am going to be asked any questions relating to it, I would like to have the map in front of me, yes, sir.

MR. DOWNEY: I have here in my hand what has been attached to the plaintiff's trial memorandum, Exhibit B, and if there is no objection I will hand this to Senator Waters and he can have it available for reference in the course of his testimony.

That is your map, Mr. Preisler.

JUDGE OLIVER: It doesn't have the districts on it, does it?

MR. DOWNEY: It has the districts on it.

MR. PREISLER: If the Court please, rather than get into this consideration, there should be a correction on that map to place—may I see it a minute—to place Camden County in the Eighth District. The line should go around Camden County instead of below it. That was an error in copying the maps. I will put that in now. The line should include Camden County in the Seventh rather than in the Eighth.

Q. (By Mr. Downey) Now, Senator, did the enactment of a Congressional Redistricting Act and efforts to enact such an act become a part of your official duty during the course of the Seventy-fourth General Assembly and the session that ended on June 30, 1967? A. Well, at least I assume it was one to try to get a bill through, and put some impetus behind it.

Q. Now, what was the paramount factor which you considered in attempting to enact Congressional Redistricting legislation? A. Well, we were under the edict of the Federal Court to redistrict the State of Missouri, based on as equal population among the districts as possible, and, of course,

I think that was our primary desire, primary purpose in the new law, the new Redistricting bill.

Q. In attempting to guide the House Substitute through the Senate in the closing days of the Seventy-fourth General Assembly, did you consider this population factor in your action? A. Yes, I did. Of course, along with the primary desire to achieve as nearly equal population as possible, at the same time you have to come up with a plan that will pass and get the votes to go through, and any legislation is a matter of compromise. So secondarily below the population deal we had a bill here which we thought we could pass and at the same time one which would meet what we though the standards would be of the Federal Courts.

Q. Well, in examining the districts of the House Substitute when it came over to you in the Senate, what particular population consideration in the various districts occurred to you in that examination? A. Well, of course, it was apparent from the—well, number one, of course, we realized that there were some mistakes in it as were later discovered, but based upon the population which we thought to be at the time, it was apparent that the district with the low population was that of the Fourth. I commented on this to one or two House members, and it was then brought out that the Fourth District did contain Eastern Jackson County, which has exhibited probably as much or more population increase since 1960 than any other part of the State with the possible exception of St. Louis County or possibly Clay.

That was one observation we made. Another observation we made was that in the Eighth District, which was the high district, it was pointed out that it does contain Fort Leonard Wood, it does contain the University of Missouri, it does contain the City of Jefferson City, in which it is well known that many people do not vote in Jefferson City but vote at home.

So that was one point that was raised in justifying the fact that the Eighth District contained more people than perhaps the others, but so far as containing more voters was concerned, it probably didn't.

Q. Well, explain what you mean about Jefferson City in regard to some people voting at home? A. Well, I think the Court probably would take judicial notice of the fact that many, many people who work in Jefferson City are State employees who maintain their voting residence at their homes over the State of Missouri, they do not vote here, and consequently would not be voting in the Eighth District.

Q. Explain what you mean about the significance of the University of Missouri in the Eighth District? A. Well, students who are enrolled in colleges are counted in the census where they go to school, and that would be true in Columbia; it would be true in Rolla; it would be true at Lincoln University. I think perhaps you have a greater concentration of students proportionally in the Eighth District than in any of the other districts because, say for example, in St. Louis, St. Louis University and Washington University. I think a greater proportion of those students actually live in that area.

Q. Now, Senator, you have testified that population was your prime consideration in considering this legislation, but you have also testified that you gave recognition to the necessity of enacting an act? A. Passing a bill, yes, sir.

Q. Did you give recognition to any other considerations? A. Yes; as Mr. Rabbitt mentioned in his testimony, we gave recognition to the compactness of a district. There were historical factors involved. I can cite one for example, that Ray County in my district has always been in the Sixth District, or whatever district represented northwest Missouri. They wanted to stay there. They were leaning on me to try to get

them to stay there, and quite naturally I was aware and took cognizance of this historical factor in trying to keep them up there so long as we could come up with something which reached the standards on the population.

Q. Senator, I forgot to ask you how long you have lived in Liberty. A. About 35 years. I have lived in the Kansas City area all my life.

Q. Now, Senator, if this Court should invalidate this Act, what observations do you have to make in regard to the future enactment in time for the 1968 elections of another act? A. Well—

MR. PREISLER: If the Court please, objection to this on the basis this is pure speculation on his part, and it is really a conclusion of the witness here.

JUDGE MATTHES: Overruled. It will be heard subject to the objection. A. Well, in answer to your question, it is an established fact that it will be necessary to have a special session of the Missouri General Assembly sometime next year, because we have only appropriated for one year, so it has to happen. The Governor, as I understand, proposes to call that special session somewhere in the general area of January 15. Now, if we attempt at that time to pass another bill apportioning the congressional districts, unless it carries an emergency clause, the bill would become effective 90 days after we close the special session, which would be long beyond the closing deadline under the Missouri law, which is the last Tuesday in April.

Q. This 90 days, Senator, is pursuant to the Missouri Constitution? A. Yes, sir.

JUDGE OLIVER: Senator, would it be subject to both Houses agreeing and the Governor approving immediate effectiveness as an emergency matter?

THE WITNESS: You mean the filing deadline?

JUDGE OLIVER: Yes.

THE WITNESS: Well, as I recall, the filing deadline is a statutory matter and I suppose that we could extend that.

JUDGE OLIVER: No, I am talking about couldn't you—you being the General Assembly—provide that any new districting would be immediately effective rather than the 90-day period?

THE WITNESS: No, as I recall it, that is the Constitution, the effective date of the law.

Q. (By Mr. Downey) Senator, you started to say something about an emergency clause to the bill. A. Well, the Constitution provides that if a bill has an emergency clause on it, it becomes effective immediately on the signature of the Governor, but it does require a two-thirds vote of each body, which is extremely difficult to achieve on any matter which is controversial, which I know this would be.

Q. Were there any two-thirds votes in the last session on a Congressional Redistricting proposal that was before the Legislature? A. I would have to check the record to see on that. I don't think so.

Q. Senator, in your experience as a member of the General Assembly and in your experience as majority leader of the General Assembly, do you have an opinion whether or not the 1967 Congressional Redistricting Act is a reasonable legislative compromise? A. I would say yes.

Q. It is your opinion that it is a reasonable legislative compromise? A. Yes.

MR. DOWNEY: No further questions.

MR. COLLINS: I have no questions.

JUDGE MATTHES: Mr. Preisler.

CROSS EXAMINATION

BY MR. PREISLER:

Q. Senator Waters, you have testified that the various places such as Jackson County, St. Louis County and others change in population. You said Jackson County was the low as a congressional district figure, and that that particular county was increasing in population, is that correct? A. I said the portion of it which is in the Fourth District was increasing. That would include Eastern Jackson County.

Q. Why in the case of St. Louis County then, in which all the districts are high, with the exception of a little bit which is in the Ninth, that St. Louis County is all high and also has an increase in population? If you consider Jackson County, the home of your residence, why didn't you consider St. Louis County, which is a more extreme example in the direction of that particular suggestion that you have made? A. It wasn't a matter of my considering it. It was a matter of some justification for the lower figure in the Fourth District. No suggested change was made in my presence that the First, Second or Third District be reduced.

Q. But they are high districts, and it is well known that the population of St. Louis County is also increasing considerably. A. They are slightly over the average. The Third District is .95 percent over. The Second is 1.03, and the First is 1.79. There are those which are more over than those three.

Q. The Eighth District also goes into St. Louis County. A. As I understand, it is an area which perhaps has not grown as much as the Second. I am not a resident of St. Louis County, and I am not as much up on these facts as I would be in my own area.

Q. There was also a statement made that the population

of Jefferson City, Columbia, Fort Leonard Wood, and so forth, does not reflect the true population of that area.

MR. PREISLER: Your Honor, I would like to suggest that we are taking the official federal census. We have no way of knowing how many or to what extent all these figures occurred, that is, that might be possible if non-residents were counted in the tabulation of the census.

JUDGE MATTHES: The Court is aware of that.

MR. PREISLER: Another question is the effective date of a statute under an emergency clause. I would like to ask the Court to take judicial notice of the actual constitutional provision in that case. As I read it, if the bill itself asks for an emergency that the bill can be passed as an ordinary bill is passed, but if the bill, after its passage or during its passage, in emergency, as suggested, say from the floor by a committee, then this other provision would apply, would be in effect, namely, if the bill is declared itself to be an emergency, to begin with, that the ordinary provisions with regard to simple majority vote would apply.

I may be in error on that, and I ask the Court to take judicial notice of the constitutional provisions with regard to the emergency bills.

MR. DOWNEY: I have no objection to Mr. Preisler asking the Court to take judicial notice of the constitutional provision. I do object to any judicial notice of his interpretation of that provision, with which I vehemently disagree.

JUDGE MATTHES: I think the question before the Court is whether the plan that is promulgated meets the test laid down. It is just that simple.

MR. PREISLER: No further questions.

JUDGE OLIVER: Do you have any additional questions, Mr. Downey?

MR. DOWNEY: I have nothing further.

JUDGE OLIVER: Senator Waters, Mr. Rabbitt indicated that Hearing Exhibits A and B were seen by him as majority leader of the House. Did you also see these figures as majority leader of the Senate?

THE WITNESS: As I recall it, Your Honor, it was either the morning this matter was proposed to the House or the morning before that, Mr. Rabbitt, in company with one or two others, came to my office and said that they thought they had a compromise worked out, and he showed me Defendant's Exhibit A at that time. I don't recall seeing B.

JUDGE OLIVER: You understood, therefore, that the figures—first, let me ask you, you had no direct responsibility on any of these bills as far as serving on the committee?

THE WITNESS: No, sir, I was not a member of the committee.

JUDGE OLIVER: As majority leader you had to take what the committee and both houses produced?

THE WITNESS: Correct.

JUDGE OLIVER: The Eighth District on the figures that the Legislature apparently thought revealed population contained 439,984 population, and as I understand your testimony, this was to take care of the possible floating population, non-Missourian in nature, in the University of Columbia, School of Mines at Rolla, and Fort Leonard Wood?

THE WITNESS: Well, let me correct that, Your Honor. It wasn't the reason; it was one of the justifications, I would say.

JUDGE OLIVER: Suppose you had known that as a matter of fact when these compromises were going on, that the

actual population allocated to the Eighth District was not 439,000-odd, but 445,523? Actually, I assume it wouldn't have really made any difference because you were under duty as majority leader to get through whatever had resulted at that time, but did you know as a matter of fact that there was over 445,000 votes allocated for the Eighth District?

THE WITNESS: No, I was not aware of the fact that there were mistakes in the computation of population.

JUDGE OLIVER: I have no further questions.

JUDGE MATTHES: You may step down, Senator.

MR. DOWNEY: Next we would like to call the Honorable Thomas Woolsey.

THOMAS G. WOOLSEY,

called as a witness on behalf of the defendants, was duly sworn and testified as follows:

DIRECT EXAMINATION

BY MR. DOWNEY:

Q. State your name and address for the record, please, sir. A. Thomas G. Woolsey, Versailles, Missouri.

Q. What is your occupation, sir? A. I practice law.

Q. How long have you been a licensed attorney in the State of Missouri? A. 18 or 19 years.

Q. What is your academic background leading up to your professional competency? A. Two years of undergraduate work at Westminster College and graduate of the University of Missouri School of Law.

Q. How long have you lived at Versailles, Senator? A. 18 years.

Q. And where did you live prior to that? A. Well, my peo-

ple—my parents lived at Boonville. I was there some. I was reared in St. Louis County.

Q. Do you hold any public office in the State of Missouri? A. Yes, sir.

Q. What is that office? A. I am a member of the State Senate from the Thirty-Third District.

Q. How long have you been a member of the State Senate? A. Since 1960.

Q. Prior to that, did you hold any other public office in the State of Missouri? A. Not for the State. I was Prosecuting Attorney of Morgan County for six years.

Q. Prior to that, did you hold any public office? A. No, sir.

Q. Do you have any official position in the Missouri Senate in addition to being a member? A. I am Republican floor leader.

Q. Now, Senator, in your capacity as Republican floor leader, did you have certain responsibilities in regard to the redistricting legislation that came before the General Assembly in the Seventy-Fourth session? A. No, I wouldn't say that I did, other than after we had finally perfected the Senate bill, the Republican members of the Senate caucused and we determined what, if any, position we would take on voting on that bill. Prior to that, I did not.

Q. Did the Republican members in fact decide to oppose that bill, sir? A. The Senate bill?

Q. Yes. A. The bill that the Senate finally passed?

Q. Yes. A. I think they all voted for it but me.

Q. That is the House Substitute or is this the bill as it went over to the House? A. This is the Senate Substitute. I

voted for and spoke for and supported the amendment in the Senate, the bill that was finally adopted, and then I voted against the bill finally because of some debate that I had had with Senator Vanlandingham.

JUDGE MATTHES: I didn't get the last part of the answer.

THE WITNESS: I say then I voted against the bill because of some debate that I had had with Senator Vanlandingham, who was the sponsor of the Senate Substitute that we finally adopted and which I supported until the final vote.

Q. Now, later on, this bill went to the House, and the legislation as it came back to the Senate was a House Substitute for that Senate Committee Substitute? A. Yes.

Q. Now, did you, as majority leader, get your party together in any position on that bill? A. No., sir. As minority leader, I did.

Q. As minority leader. A. I wish it had been the other way.

JUDGE MATTHES: One member of the court might agree with you. A. Yes, we decided that the Senate bill was preferable to the House bill and we voted—there were several votes; I don't recall how many, but we voted, some members of the other party, to turn down the House bill and try to pass the Senate bill.

JUDGE OLIVER; Senator, why did you prefer the Senate bill to the House bill?

THE WITNESS: I thought it was fairer to the people.

JUDGE OLIVER: What criteria did you apply to reach that conclusion?

THE WITNESS: Well, Your Honor, I think that the—I

don't know whether the Court wants to be bored with my basic philosophy of Government, but that is the reason I felt that way. I feel that the representative in the House, whether it be the federal congress or in the state, wherever it is possibly, should be in a district that can go either way in an election, so that if the administration, regardless of party, is doing things that the people don't like, they can elect a representative in the other party and change it; and I thought the Senate bill, while it wasn't particularly favorable to the party of which I am a member, I thought that it was more favorable than the House bill which we finally passed, and I might further say, Your Honor, that I felt that it doesn't make any difference who draws it, there isn't a man in this room that couldn't divide the State on the 1960 population and come up with compact, contiguous districts that come within close equal population, but, on the other hand, you have to pass that bill through the Legislature, and I don't think that you can pass one that falls within the norm as set out under present criteria, and if you did, as Senator Waters brought before the Court, it would not carry out the so-called one-man-one-vote theory because of the changes of population we have had all over this State and all over the nation since 1960.

JUDGE OLIVER: Senator, in that connection, this same argument was made to this Court in regard to the 1965 Act, and this Court was assured that the very best job that could be done as a matter of political compromise was the change made by the Seventy-third General Assembly over the work of an earlier General Assembly. The 1967 Seventy-fourth General Assembly made very, very substantial improvement over what we were assured was the best that could be done.

Are you totally confident that the State of Missouri is incapable of doing the same or a comparable job that the

State of Michigan, State of Kansas, other states that have in fact—

THE WITNESS: I don't know what the political makeup of the Assembly of Kansas or Michigan is, but I know what ours is, and when you have two to one majority on a political basis, I think that anything you get will be a compromise, and you have to have, I think, the members of the majority party who have the votes to pass the bill, whenever they compromise among themselves, then the few of us that are there when we have whatever influence we have, I think that that is what you are going to get.

JUDGE OLIVER: The highest responsibility actually rests on the majority party in a political situation that you speak of.

THE WITNESS: I think so, yes, sir, and I think, regardless of how it is, if it were two-to-one the other way in Missouri, it would still be the same situation.

Q. (By Mr. Downey) Senator, based upon your experience in the General Assembly, based upon your experience as minority leader of the General Assembly, do you have an opinion whether or not the 1967 Congressional Redistricting Act is a reasonable legislative compromise? A. I think, considering the present makeup of the General Assembly, that it was.

MR. DOWNEY: Thank you, sir. No further questions.

JUDGE MATTHES: Mr. Collins.

MR. COLLINS: No.

JUDGE MATTHES: Mr. Preisler.

MR. PREISLER: No.

JUDGE MATTHES: You may step down. Thank you, Senator.

MR. DOWNEY: We will call the Honorable R. J. King.

R. J. KING, JR.,

called as a witness on behalf of the defendants, was duly sworn and testified as follows:

DIRECT EXAMINATION

BY MR. DOWNEY:

Q. State your name and address for the record, please, sir. A. R. J. King, Jr., 816 South Handley Road, Clayton, Missouri.

Q. What is your occupation, Mr. King? A. I am an insurance broker. I have an insurance agency.

Q. Mr. King, would you recite for the Court your academic background? A. I attended the University of Missouri for a year and a half, graduated from public schools.

Q. In addition to this academic background, do you have certain honorary academic background? A. I received an honorary degree from St. Benedict College this last spring, where I have been a member of the Board of Trustees for some eight or ten years.

Q. What was that degree, sir? A. Honorary degree of law, Doctor of Law. Unfortunately it doesn't permit me to practice, I understand.

Q. That gives you the privilege of advising the lawyers rather than practicing? A. That is right; advise rather than practice, without fee.

Q. Now, Mr. King, what public office, if any, do you hold in the State of Missouri? A. I am a member of the Missouri House of Representatives from the Thirty-Ninth District in St. Louis County.

Q. How long have you been a member of the Missouri House? A. Well, I have been a member two different times. I

was a member from Franklin County for six years, 1943 to 1949, and then was elected to the House from St. Louis County in 1958, and have served continuously from St. Louis County since this time, a total of eight terms now.

Q. A total of eight terms? A. Completing my eighth term.

Q. Mr. King, do you hold any official position in the General Assembly other than being a member from your district? A. I am the minority floor leader, Republican floor leader of the House.

Q. Have you held any other official positions in the General Assembly in the past? A. I was majority floor leader of the Missouri House in the Sixty-fourth session, 1947-48.

Q. Mr. King, did you have any duties in regard to your party and your official position in the Missouri House concerning the 1967 Congressional Redistricting Act? A. Well, certainly as the minority leader I advised with our members, both those who were on the Congressional Redistricting Committee of the House and with the members in caucus, and individually, as minority leader.

Q. I believe the record reflects, sir, that you voted, and a good many members of your party voted, against the House Substitute which eventually was enacted, is that right, sir? A. I believe that is right. If I recall, I think a great majority of the Republican members voted against the bill which eventually became law.

Q. Would you tell the Court generally the reasons for this opposition? A. Well, by the same token, most of our members supported the Senate Committee Substitute that came over to the House and which was heard by the House Committee and which then was before us after the House Committee Substitute was adopted, because we felt that it was a fair and equitable distribution, or as fair as we could hope

to have, and that it gave—actually, as far as we were concerned, it gave better representation to the minority party insofar as congressional redistricting was concerned than did the House Substitute which we first voted upon and as did the House—or the House Committee Substitute which was first voted on, and then the House Substitute which we later voted upon.

Q. The position generally of the minority party in regard to the House Committee Substitute was about the same as it was in regard to the House Substitute? A. No, no, it was a little different, I would say, I think we were very much opposed to the House Committee Substitute. Our opposition was not as much against the House Substitute. We voted against it because we felt that the Senate Committee Substitute was fairer to our party in congressional redistricting representation, and in that respect we thought it was a better bill, a stronger bill, because it did give more credence to at least a semblance of a two-party system, added to its strength, in Missouri, which we felt that the House Substitute did not, and in fact the present law did not lend itself to this kind of a situation.

Q. Mr. King, based upon your experience as a member of the General Assembly, and based upon your experience as a former majority leader of the General Assembly and based upon your experience as a present minority leader of the General Assembly, do you have an opinion as to whether or not the 1967 Congressional Redistricting Act is a reasonable legislative compromise? A. I believe, in retrospect, that it is a reasonable and fair compromise. I would say that most of our opposition to the House Substitute came from, one, the fact that we did not have a real good opportunity to see this bill, this substitute, we really didn't know what it did, and I think this is evidenced by the fact that the errors in the population figures showed up, and, two, that some of our

members felt that their own respective individual districts were not being treated as fairly in the House Substitute as they were in the Senate Committee Substitute, and on this basis I believe is the reason that we had almost unanimous opposition to the House Substitute, but I think in retrospect it is a reasonable and fair or as reasonable and fair as we could hope to have passed in the Missouri House in its present composition.

MR. DOWNEY: Thank you, Mr. King. No further questions.

JUDGE MATTHES: Mr. Collins?

MR. COLLINS: No questions.

JUDGE MATTHES: Mr. Preisler.

CROSS EXAMINATION

BY MR. PREISLER:

Q. Mr. King, apparently you gave more attention to the question of getting the bill passed than you did to the population. A. Well, no, I wouldn't say that. We were very much interested in the population, but by the same token I would say that when you look at the variances in the population, there isn't enough discrepancy for us to take the position that there should be an at-large election rather than to take a bill that we may not think is completely satisfactory to us and yet it would be a fair compromise against an at-large election.

Q. In an at-large election, all that occurs is, there is no bill passed, and did you examine the bill, the map of the bill and its population of the counties and the like just before you voted on the bill? A. Yes, we examined it. We tried to know what we were doing. It was rather hard, I would say, because of the fact that it had come on the floor as a Substitute. We hadn't had much opportunity to see it, and

we voted against it as the record indicates, and as I indicated in my testimony prior.

Q. As minority floor leader, did it ever occur to you personally that the bill could be improved and made more close to the required population equality if a few counties had been shifted? A. Well, I assume that is right, yes, and we felt that there were some changes that could be made, but again we are certainly not in a position to control it completely, and maybe if we had been in control we would have tried to write a bill that would have complied more completely, but I doubt if we could have arrived at that situation. I doubt seriously if in the present makeup of the present assembly—and I don't mean political makeup necessarily as I do the regional makeup. I question seriously had we been in control—we may have changed the boundaries to some extent, but I question seriously if we could have come up with a better bill insofar as population discrepancy is concerned. We may have changed the political complex of it, I assure you, had we been in control, but I question on the basis of regional makeup, not political makeup, whether or not we could have changed the population discrepancy to a nearer equal basis than that which is contained in the bill which finally passed.

JUDGE OLIVER: Mr. King, what do you base your conclusion on?

THE WITNESS: Well, I think there are problems which exist, and I think the Senator from Liberty expressed some views on this, which we know that a voting makeup of the district, like the Eighth, where you have the entire Fort Leonard Wood population—we ran into the same thing in the House Redistricting, or at least the Commission did, the population of Cole County, because of the State employee situation, the population of Boone County, because of Columbia, Missouri. I think, too, that we were working with a

legislative body that was elected on a 1966 basis with a population on a 1960 basis and this was a rather unique situation, and I think that the areas that the men represented, they felt they had an obligation to their people, which I am sure they did have, which I think they probably discharged that obligation as they saw fit to do, and for this reason, I question, Your Honor, whether or not either party that controls the House could have come up with a bill that would have been more equitable insofar as the population figures were concerned. I don't say that we couldn't have changed the political complex of it to some extent.

JUDGE OLIVER: Did you as minority leader in the House also operate under the impression that the figures on the map that have been introduced in evidence were the accurate figures?

THE WITNESS: Are these the first figures that were furnished to us, Your Honor? I can't remember these figures from memory. But at least we operated on the theory that the population of these districts were those which were furnished to us the day the House Substitute was introduced.

JUDGE OLIVER: Did you know that only two of the ten districts were accurately reported?

THE WITNESS: Since the session adjourned I have understood that. I didn't see the figures until just today, the actual figures.

JUDGE OLIVER: Yesterday was the first day that you knew that the figures under which the compromise that all witnesses have outlined were not accurate figures?

THE WITNESS: Not yesterday. I think I knew it earlier than that. I wouldn't say yesterday, but I didn't know the exact figures difference until this morning.

JUDGE MATTHES: Thank you, Mr. King.

MR. DOWNEY: We have no further witnesses, Your Honor.

JUDGE MATTHES: Mr. Preisler, do you desire to call any witnesses?

MR. PREISLER: Your Honor, in view of my previous statement that I felt the witnesses should be excluded entirely as being unnecessary, in view of the fact that the map that is documentary evidence and the various other matters of which the Court might take judicial notice, plaintiffs will not call any witnesses.

JUDGE MATTHES: Very well.

MR. PREISLER: Except I have to introduce some exhibits, and I think the easy way to introduce them for the record would be to place the plaintiff himself upon the stand as a witness.

JUDGE MATTHES: However you want to handle it, Mr. Preisler.

MR. PREISLER: Well, I think that would be better.

JUDGE MATTHES: It may be counsel will agree.

JUDGE OLIVER: Have you shown these to counsel?

MR. PREISLER: Practically all of them. There are some matters that came in this morning.

JUDGE MATTHES: We will recess for about five minutes and counsel will take a look at them.

(Recess—10:55 A.M. to 11:05 A.M.)

JUDGE MATTHES: Have you gentlemen reached an agreement on the exhibits?

MR. PREISLER: With regard to those that will be acceptable and those that will not, and I will offer the one that is not and we will submit that to the Court.

Your Honor, there are a number of exhibits that plaintiff would like to offer which will complete the number of exhibits that have already been submitted. One is a letter from the Department—

JUDGE MATTHES: What is the number?

(HEARING PLAINTIFF'S EXHIBIT A WAS MARKED FOR IDENTIFICATION)

MR. PREISLER: It is No. HP-A, a letter from the Department of Commerce, Bureau of Census, dated October 31, 1961. It is a correction upon a bulletin, Exhibit 3 in the previous case. That is Item 29 of the stipulation. It gives a corrected figure for the wards at that time, 1961, on Page 10 of the Exhibit 3, just if the Court wants to use this at some time for a reference.

(HEARING PLAINTIFF'S EXHIBIT B WAS MARKED FOR IDENTIFICATION)

MR. PREISLER: Exhibit HP Exhibit B is a letter from the Department of Commerce, Bureau of the Census, on Official Cost Estimate and Acceptance, Reimburseable Work for Services. This letter was received by me on Saturday, October 21, 1967, in reply to a telephone conversation with the Bureau of the Census, asking them the cost and the time necessary to prepare certain information, namely, the cost of the correct ward population for each ward of Kansas City.

(HEARING PLAINTIFF'S EXHIBIT B WAS MARKED FOR IDENTIFICATION)

MR. PREISLER: HP Exhibit C, a similar letter, Official Cost Estimate and Acceptance, from the Department of Commerce, Bureau of the Census, which gave me an estimate, a letter which I received on the 21st of October 1967, an estimated cost and time required to prepare the correct popula-

tion according to the Census Bureau of all of the precincts of St. Louis County.

(HEARING PLAINTIFF'S EXHIBIT D WAS MARKED FOR IDENTIFICATION)

MR. PREISLER: Merely to correct the record, HP Exhibit D with the map which was testified to by one of the witnesses today in which the correction is made in which Camden County is included in the Seventh instead of the Eighth. This is a corrected Plaintiff's Exhibit B.

JUDGE MATTHES: The defendants have agreed to admit these four items in evidence?

MR. DOWNEY: We agree, Your Honor.

MR. COLLINS: That is correct, Your Honor.

(HEARING PLAINTIFF'S EXHIBIT E WAS MARKED FOR IDENTIFICATION)

MR. PREISLER: As a fifth item, HP Exhibit E, which is a map of the new congressional districts in the city and county taken from the St. Louis Post Dispatch, July 6, 1967, a map prepared as shown on the map by Mr. Albert Sweitzer of the St. Louis Post Dispatch, artist. This was included in Plaintiff's memorandum, and the map without the text—with the text torn off, is offered in evidence for the purpose of giving a general picture of the location of the various congressional districts as the final bill was passed in St. Louis County and St. Louis, for the information of the Court. I offer it in evidence.

MR. DOWNEY: Now, Your Honor, we object to the admissibility of this exhib into evidence. We have examined the map and we are unable to tell the Court whether or not the districts as outlined on the map accurately reflect the general geographical description of those districts, and we

simply don't know anything about the reliability of this particular map, and therefore we object to it.

MR. COLLINS: May it please the Court, the intervenor defendants also object to HP Exhibit E because of lack of identification and any evidence as to accuracy or authenticity.

JUDGE MATTHES: The Court has been rather liberal in receiving in evidence any exhibits and we will receive this exhibit, including the last one. The last one is subject to the objection.

MR. PREISLER: I submit them for what they are worth and giving the general picture of the districts in St. Louis County.

JUDGE MATTHES: Anything further now, gentlemen? What about oral argument? Do you care to argue it? I might state in advance what the Court's position is. I think we are fairly conversant with the issues that are involved here. However, if you want to argue it, we will give you some time to do so. I believe we are pretty well informed. I think we know what the issues are.

MR. PREISLER: I understand we will be given a reasonable time for preparation—

JUDGE MATTHES: We will reach that question next. What do you say about the oral argume..ts, gentlemen?

MR. DOWNEY: Your Honor, we will be glad to offer a short oral argument. Our position has been pretty well developed in our trial memorandum.

JUDGE MATTHES: That is the reason the Court has taken the position it has. I think the question has been fully briefed by all parties, and the issue has been delineated, and I think we are conversant with the situation.

MR. DOWNEY: I might say in connection with our trial memorandum, we have cited two cases which are not reported, and we did not have copies of those cases available at the time we filed the memorandum. We do have this morning. We would be glad to file copies of those decisions.

JUDGE MATTHES: Well, suppose you send us a brief memorandum giving the brief citation of those cases.

MR. DOWNEY: I don't think they are reported, Judge.

JUDGE MATTHES: What case were you referring to?

MR. DOWNEY: I am referring to the case of **Connor** against **Johnson.**

JUDGE MATTHES: That is a Mississippi case?

MR. DOWNEY: A Mississippi case, and—

JUDGE MATTHES: Well, you refer to that in your brief, I believe, Mr. Downey.

MR. DOWNEY: I refer to it in the brief. The case is not reported, and I thought the Court would like to have the full text of the decision.

JUDGE MATTHES: Yes, we would like that.

MR. DOWNEY: And the same thing is true of the North Carolina case, **Drum v. Seawell.** It is not yet reported.

JUDGE COLLINSON: It came out in this week's advance sheet.

JUDGE OLIVER: 371 F.Supp. Mr. Downey, you argue in your brief that the congressional reapportionment case from the Southern District of Mississippi was affirmed by the Supreme Court of the United States. Have you checked sufficiently close to know whether or not that portion of the case as distinguished from the State reapportionment reported in 265 F.Supp. 492 was in fact the only portion of the

order that went up from the Southern District of Mississippi and affirmed in 386 U.S. at Page 483?

As I read the Mississippi situation, the first Mississippi three-judge court was 256 F.Supp. 962. Both the State apportionment and the congressional apportionment was attacked, but the opinion was confined solely to the State reapportionment, which was held to be unconstitutional, and that opinion noted that the Mississippi Legislature had in fact passed a congressional act. The unpublished opinion approving the congressional act is reported September 28, 1966, from which, so far as my knowledge is concerned, was not appealed at all.

Conner v. Johnson later had the second State reapportionment, reported in 265 F.Supp. at 492, and that case dealt specifically and restrictively with State reapportionment, which again was held unconstitutional, and the Supreme Court affirmed, in either a one or two-sentence opinion, I have forgotten which—sometimes they advance on the docket and affirm or reverse in the same sentence and sometimes it takes two sentences—but, at any rate, the affirmance was in 386 U.S. 483.

Now, it would be apparent only from the reporting but not from an accurate search of the court records that the approval of the Supreme Court of the United States was only of the reversal of the affirmance of the declaration of the unconstitutionality of the State reapportionment.

Have you checked out the actual court record to know whether your statement that the congressional case itself had been affirmed by the Supreme Court is accurate?

MR. DOWNEY: Yes, Your Honor, we have inquired of the Attorney General's office in the State of Mississippi about this matter, and the Attorney General's office has furnished us with a copy of the jurisdictional statement

which was filed by the appellants in the Supreme Court of the United States, and the jurisdictional statement is devoted solely and exclusively to the affirmance by the lower court of the congressional redistricting act, and therefore the citation to the decision of the Supreme Court of the United States which we refer to was made on the motion of the Attorney General's office of the State of Mississippi to affirm the judgment of the lower court based upon these issues which were raised in the jurisdictional statement attacking the affirmance by the lower court of the congressional redistricting act.

JUDGE OLIVER: What does the brief state as to the report of the opinion below?

MR. DOWNEY: Pardon me, Your Honor?

JUDGE OLIVER: The jurisdictional statement filed in the Supreme Court of the United States should have a section in which the attention of the Supreme Court of the United States will be directed to the opinion below. Now, is the citation given in that 265 F.Supp. or an unreported opinion?

MR. DOWNEY: It is an unreported opinion, Your Honor.

JUDGE OLIVER: I think it would be helpful if you would furnish the Court with copies of that, too.

MR. DOWNEY: Very well.

JUDGE MATTHES: Now, Mr. Preisler, you have indicated you want to file another brief.

MR. PREISLER: Well, it was my impression in the conference that was previously held that the opportunity would be given to file another brief. Now, there has been some new evidence come in here and new comments made in the Attorney General's memorandum, which I only received last Fri-

day, with a long list of statements with regard to what has occurred in other states. I have not checked the accuracy of that. I don't know whether any of these are correct. For example, if the Attorney General himself had been asked a month ago as to what the population of the districts in Missouri under the last act was, he would have given what he gave originally in this court which was on file in the Secretary of State. I mean I don't blame him or anyone else for the inaccuracies, but the inaccuracies were there. In the same way we do not know then what the inaccuracies in—

JUDGE MATTHES: Can you file another brief in five days, Mr. Preisler?

MR. PREISLER: Well, yes, I think in view of the situation today, there are other matters I would like to bring out, like the reason for the letter from the Census Bureau, namely, that these matters such as St. Louis County precinct populations could have been obtained at a reasonable fee for the Legislature and the like.

JUDGE MATTHES: Very well, if you can file one in five days. Does the Attorney General or the intervenors desire to file additional briefs?

MR. DOWNEY: Well, Your Honor, upon examination of the additional brief of Mr. Preisler, we might want another five days to reply to it.

JUDGE MATTHES: Why don't you, both sides, file additional briefs within five days, if you care to file them simultaneously. We want to try to dispose of this matter as expeditiously as possible.

MR. DOWNEY: Your Honor, in regard to the Mississippi decision, we have copies of that opinion in the court this morning, which we can leave with the court. We do not have copies of the jurisdictional statement. We can prepare those and mail those to the Court.

JUDGE MATTHES: Very well, and mail a copy to Mr. Preisler.

MR. PREISLER: May I ask the Court whether they have a copy of **Gong v. Kirk**, which was in litigation only as late as two or three weeks ago?

JUDGE MATTHES: There is one of those opinions that is published, because I have read it.

JUDGE OLIVER: What state?

MR. PREISLER: A motion was filed as late as the end of September in that case.

JUDGE MATTHES: Isn't that the Florida case?

MR. PREISLER: That is the Florida case.

JUDGE OLIVER: We have the Florida case.

MR. PREISLER: You say five days. That would be a week from today.

JUDGE MATTHES: Yes. What is today? Today is the 23rd: We will get them in on or before the 30th. We will stretch it and give you seven days.

MR. PREISLER: Thank you.

JUDGE MATTHES: Very well, the case is submitted. Court will stand adjourned subject to call.

* * 11:20 A.M. * *

(REPORTER'S CERTIFICATE OMITTED IN PRINTING)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

(TITLE AND APPEARANCES OMITTED IN PRINTING)

(JURAT OMITTED IN PRINTING)

(STIPULATION OMITTED IN PRINTING)

OMER H. AVERY,

a witness, being first duly sworn in the above cause, testified on his oath as follows:

DIRECT EXAMINATION

by Mr. Wood:

Q Senator Avery, would you please state your full name? A Omer H. Avery.

Q And what is your occupation? A Attorney, and member of the State Senate.

Q From what Senatorial District? A The 21st.

Q Senator Avery, would you state what your action in the 74th General Assembly in relation to Congressional Redistricting was? A I was appointed Chairman of the Redistricting Committee, Reapportionment Committee, it was called.

Q In connection with this duty, did you have occasion to introduce in the Senate of the Missouri Assembly a bill relating to Congressional Districts? A Yes, Senate Bill No. 182.

Q Would you describe what considerations you used in formulating this bill that you introduced? A Yes. In the first place, I took into consideration the population of the various districts which we had had previous experience on,

redistricting, and I wanted to have the bill as introduced as nearly equal in population as I thought was possible. However, in introducing this bill, the census figures for the various wards as they had been changed, and the townships in St. Louis County, had not been made available. And this bill was based solely on the 1960 census, and the conformation of the wards in St. Louis and the townships in St. Louis County, and likewise in Jackson County. They conformed with the '60 census and not with the subsequent changes.

Q Senator, were you aware when you were preparing this bill of the decision of the Federal Court, Western District of Missouri, about representation to the 1965 Congressional District Plan? A Oh, yes, I was aware of that.

Q Had you read the opinion? A I have read the opinion, yes.

Q And were you aware of the requirement that Congressional districts be equal in population as nearly as possible? A As nearly as possible, and that was—I realized when I introduced this bill that there would have to be a substitute because I knew the changes had been made in St. Louis, St. Louis County and Jackson County and that there would be a required, a substitute required to conform to the present figures.

Q You were not aware of what the correct population figures for St. Louis, St. Louis County, Kansas City and Jackson County were? A We were waiting for that information. We were waiting for the changes. We were then four weeks into the session.

Q Now, after introducing your bill, what was the subsequent action taken with regard to your bill? How was it handled in the Senate? A In the committee. Of course, the bill was introduced in the Senate, was read the first and second time and then sent to committee.

Q Were you a member of that committee? A Yes, it was sent to the committee, the Reapportionment Committee, of which I was chairman.

Q Would you briefly tell us what happened to your introduced bill? A In the committee then, subcommittees were appointed for the St. Louis area and the Jackson County area with the idea that they would obtain the information on the latest information concerning conformation of these areas and report back to the committee so that we might formulate a committee substitute, which we did.

Q Now, was the duty of these subcommittees to ascertain current population figures, among other things, for these areas of St. Louis and Kansas City? A Current population figures and the formation, the geographic formation of the wards and townships.

Q Who were on these committees, these subcommittees, can you recall, for each area, St. Louis and Kansas City? A Let's see, in St. Louis, I think—I don't recall. I wouldn't want to say because I don't have that, those records with me. I can tell you part of them. I would be afraid I would miss someone.

Q Could you do that? A Yes, I know Senator Young was a member.

Q He is from the St. Louis area? A The St. Louis area. Senator Clifford Jones was a member and I am inclined to think that Senator Kinney was. I don't recall. I think he was a member of that subcommittee.

Q Those three Senators were from the St. Louis area? A At least those three, but there might have been another. I don't recall. In Kansas City I remember specifically Senator Ryan. There was somebody else up there in the Kansas City area. In the outstate, Senator Spradling and I think perhaps Senator Cason might have been one in the Kansas

City area, in that district up there. And Senator Spradling and—I don't recall.

Q Now were correct population figures and ward and township boundaries for the St. Louis area supplied to you by any of these Senators that you have named for your work in the committee? A Well, I would have to assume that they were correct. They were supplied.

Q They were supplied to you? A Yes, they were supplied to me. In St. Louis, the city of St. Louis, through the Board of Election Commissioners, I think Mr. Leitz. The St. Louis County Senator, Senator Jones, obtained these figures from the organization in St. Louis County that takes care of the election matters. And Senator Ryan talked to Mr. Matthews, the secretary of the Jackson County Board, and Mr. Matthews mailed direct to me the figures from Jackson County.

MR. WOOD: Will the parties stipulate that Senator Avery was supplied with population figures for the St. Louis County townships as they are reflected in exhibit, stipulated Exhibit No. 23, and population figures for the wards in St. Louis City as they are reflected in stipulated Exhibit No. 18?

MR. COLLINS: We will so stipulate.

MR. PREISLER: I will stipulate that, but I think here we might put in approximately when the committee received this information.

Q (by Mr. Wood) Can you supply us with that information? A It was during the month of February, and I would say during the month of February because we didn't take any further action.

(DEFENDANT'S EXHIBITS A, B, C AND D WERE MARKED FOR IDENTIFICATION BY THE REPORTER).

Q (by Mr. Wood) Senator Avery, I show you what has been marked Defendant's Exhibit B and ask you to identify it. A That is a map of the wards of the City of St. Louis furnished to me by the Board of Election Commissioners with the population figures for each ward, some of which I have written over in ink because they were hardly legible, and I did that for my own convenience in referring to the map.

Q To the best of your recollection, where did you receive this map? A That was mailed to me.

Q By whom? A By the Board of Election Commissioners, I assume Mr. Leitz, but I don't know.

Q Approximately when did you receive this? A That would have been in the latter part of February.

MR. COLLINS: By "this" you were talking about Exhibit B?

Q (by Mr. Wood) Exhibit B, it is? A Yes.

Q Senator Avery, I notice under Ward 6 on Exhibit B and under Ward 28, and under Ward 25 some alternative figures are expressed, for instance, under Ward 28, "or 22,392" has been written in in ballpoint pen. Would you explain these notations, please? A Well, the one on No. 6, on Ward 6, I recall specifically that at the time I looked at it, I thought, and I made a notation on there, so I would check it, I thought it was 15,595 and I just made that notation for my own convenience. It was 18,595. Now in Ward 28, I recall that at one time when this bill was passed out of committee and before it was taken up in the Senate, we ascertained that because of the very peculiar formation of one of the townships in St. Louis County, to which Ward 28

was supposed to be attached, lacked about a block or two of the city of being attached because of a V-shape in the township, so we took out several wards, 18, 19, 20, 21 and 22, I believe, but anyway some of these wards and I am quite sure that probably, I'd say "or 22,392" as it would have been changed if we had made that change.

Q Would that have been removed precincts from that ward? A Yes, precincts 22, 21 and 20.

Q From Ward 28? A Yes. That was merely a notation of mine, which has not particular significance on the outcome of the bill or anything. Now then you said there was another 29,349 or 27,514 in Ward 25. I have two different indications in pen there of different populations. I think they were based on whether or not we would split up precincts from that ward. That is all to my best recollection of it. They were merely notations from my working on them to make me remember to look up some feature of the bill.

Q Senator Avery, was this Defendants' Exhibit B utilized by you and your committee during the deliberations on Senate Bill No. 182? A Yes, sir.

MR. WOOD: I offer this into evidence, Defendants' Exhibit B.

MR. COLLINS: No objection.

MR. PREISLER: No objection.

Q (By Mr. Wood) Senator Avery, I show you what has been marked Defendants' Exhibit C and ask you to identify it. A That is a map of Jackson County setting out the various townships with the population figures shown on each, and this is the condition that this was in when I received it. It was mailed to me by a Mr. Matthews of the Board of Election Commissioners of Kansas City. I think he is secretary of the Board.

Q Senator, you said townships of the county. Did you mean wards of the city of Kansas City? A Oh, yes, I believe it is. It has wards in it. It is wards in Kansas City, wards of the city, yes.

Q Senator Avery, there appears on Defendants' Exhibit C red numerals. Would you tell us what the source of these red numerals is? A I don't know the source. They were on there as they are when I received the may.

Q When you received the map? A Yes. I assume that the source would have been some member of the Board of Election Commissioners up there, or the secretary, but I don't know.

Q What did you interpret the significance of these numerals? A The population of the various wards set out on the may.

Q The current populations? A As they appeared in 1966, I believe it was, as they appear now, as they exist now, yes.

Q Senator Avery, did your committee use Defendants' Exhibits C, in other words, in its deliberation on Senate Bill 182? A Yes, were were guided by it and adopted those figures.

MR. WOOD: I offer this into evidence, Defendants' Exhibit C.

MR. COLLINS: No objection.

MR. PREISLER: Well, I will object until the time that these figures are shown, the source of these figures are shown.

MR. WOOD: You mean subject to these—

MR. PREISLER: If they match where he says they got the, if they match that sheet.

Q (by Mr. Wood) Senator Avery, a moment ago you re-

ferred to a Mr. Matthews as the source, as the supplier to you of Defendants' Exhibit C. Did you intend to say Mr. Matthews? A Since then I have referred to a letter that I received from Mr. Matthews and he sent me the map, the precincts maps covering Jackson County outside Kansas City and it was Mr. Martin that sent me the Kansas City map.

MR. WOOD: Mr. Preisler, do you still object to the Defendants' Exhibit C?

MR. PREISLER: No, not as it has been explained, the source of the figures as Mr. Wood and I determined came from an estimated population made by Mr. Martin or someone in the office of the Board of Election Commissioners at Kansas City.

Q (by Mr. Wood) Senator Avery, could you relate to us what considerations your committee used in their deliberations on a Congressional districting plan, specifically Senate Bill No. 182?

MR. PREISLER: I am going to make an objection that this is the conclusion of the witness.

MR. WOOD: All right.

WITNESS AVERY: We gave consideration to several elements, primarily the population of the various districts attempting to equalize them as much as we could and felt would be acceptable, under the previous ruling of the Courts. It was also the desire of the committee that the districts, the ten districts be changed only as much as would be necessary to make them come within the population limitations and not try to make any political complexion changed designedly as to any particular district.

The next consideration that we adopted was that the districts should be made, the conformity of them should be as compact and as regular as was feasible. In doing this,

District No. 8, it was just like squeezing a sponge and the middle was District No. 8. I want to explain one thing for the record. In District No. 8 that we gave consideration to and we had cognizance of, District No. 10 has 423,866 population. District No. 8 has 439,984. There was a suggestion and consideration that Dent County be put into the 10th District rather than the 8th District and we weighed that, and after consideration, we felt that population-wise 10 without that county would be only a little over 2% under and that 8 with that county would be approximately 2% over. But we felt that it would be more logical and it would be more regular, the lines would be more regular and that it would look a little better as far as District No. 8 is concerned to put Dent county in District No. 8 and that was the reason for Dent county being there.

I think we gave it due consideration. I think it's a valid reason for that and the committee so felt. And that does explain that matter that would, we felt, that the consideration of regular lines was as important as that of population, where it was within reason and we felt that 2% one way or the other was within reason.

Q (by Mr. Wood) Was within reasonable variation from the population standpoint? A Yes, and we thought it would make District 8 have a little better and more appealing figure than if you put Dent in No. 10.

I might say it's mighty easy to sit before the fireside and divide this state, and either one of us could do it very much better than this is done perhaps, but when you got 163 members of the House and 34 members of the Senate and everybody having equal privilege, right to consider a redistricting, it soon gets away from one man's thought about the state and how it should be districted.

Q Senator Avery, I show you Defendants' Exhibit A

and ask you to identify it. A I do identify it. I want to make one suggestion or correction in this exhibit.

Q Would you please first identify it. A I beg your pardon. This is the map of the state of Missouri and the counties as it was divided under House Substitute for Senate Committee Substitute for Senate Bill No. 182.

Q Does this exhibit reflect your markings in any way? A Well, I would say they are my secretary's.

Q Which markings are those? A That is everything in red. The divisions, the division lines and the population figures.

Q Your secretary made these entries? A She made those entries with me. We worked together on it.

Q The map itself, where did you obtain it? A I had hundreds of these maps. Do you want to know its inception?

Q Yes. A The inception of that map goes back to 1961 when I got a map of the state of Missouri and that is all my handwriting, the figures in there, taking the census figures of each county and of the City of St. Louis and of St. Louis County and putting them in the map so that when you consider the map, you can get your population of your counties readily without referring to the census figures all the time.

Q On the original print or proofs, you personally inserted from the 1960 census bureau publications the population for each county? A That is correct.

Q On that map? A That is correct. And I want to make one correction on this map which was not ascertained until 1967 when we did this redistricting. Dade County for some unknown reason, I put 12,647 people in Dade County, when as a matter of fact Dade County has a population of 7,577. So, as I recall it, that is a 5,070 less, and the figure for District No. 7 of 436,769 should be reduced by 5,070.

Q Now, at what course of the legislative history of Senate Bill No. 182 did you prepare this map insofar as the red markings are concerned?

MR. COLLINS: By "this" you mean Exhibit C?

WITNESS AVERY: Defendants' Exhibit A.

Q (by Mr. Wood) Defendants' Exhibit A? A Well, let's see. I would have to refer to this to tell you. It was whenever this bill came back, or whenever it was passed by the House over there. June 19, if I remember correctly. On or about June 19, 1967.

Q That is you and your secretary prepared this map reflecting the district as drawn in House Substitute for Senate Committee Substitute for Senate Bill 182 at the time the House Substitute was returned to the Senate? A Well, it was probably at the time it was introduced in the House. It was sometime during the time it was being considered by the House so we would have some information about it before it got to the Senate.

Q Senator Avery, Mr. Preisler in his pleadings that have been filed with the Court has suggested as an example of how a more equal population between the 8th and the 10th Districts could have resulted that certain townships in Texas County, Missouri, could have been shifted from what is in the 8th District according to the House Substitute for the Senate Committee Substitute those townships could have been shifted from the 8th to the 10th District. Did your committee consider such a possibility. A No, sir.

Q Would you indicate to us whether your committee gave consideration to a shifting of any of those counties from the 8th to the 10th District or splitting any counties in the 8th District so as to give the 10th a greater population? A Let's talk about the splitting. The committee and I think it was the concensus of the entire legislature that we should avoid

splitting a county if at all possible. And that is what we tried, that is what we did. We didn't split any counties, except of course the St. Louis County and Jackson County.

Q Could you give us your reasons for reaching this conclusion that counties other than St. Louis and Jackson Counties should not be split? A Well, one reason would be that it would be disrupting to the election processes in the county. But the main reason was that we just felt it was not, that our populations could be divided within a range of a couple of degrees one way or the other, and the other, not disturb the counties and the people in the counties by being divided. A Mr. Preisler also suggested to the Court that Texas County might easily have been placed in the 10th District and Iron County be placed in the 8th District, thus resulting in a more equal population as between the 8th and 10th Districts. Did your committee consider such a possibility? A I don't think so. We considered many possibilities and that is what I was trying to say a minute ago. You've got 197 people over there and any of these counties could be shifted over one to the other and make very little difference, make a little difference in population. This is what we wound up with after discussing many, many suggested changes by various members of the legislature. But we were guided principally by keeping the population within a reasonable range, which we felt we did by 2% over and under, or approximately.

MR. WOOD: Fine. I am through. Mr. Collins or Mr. Preisler, you can examine.

CROSS-EXAMINATION

by Mr. Preisler:

Q I am most concerned about when you got all this information, Mr. Avery, for example, there are various tables of population and several maps which you say the commit-

tee had those in its hands approximately before the first of March. A Mr. Preisler, it's my honest opinion we did have those on or about the first of March. It would probably be during the month of March. There is no definite date. I notice one of them says February 19. We got it very soon after the latter part of February or about that time would be my guess. That is the St. Louis and St. Louis County figures. Now, if I remember correctly, it was another week or two—there was a delay in getting the Kansas City and Jackson County figures, but it would have been during the month of March, I am quite sure.

Q Did you ever ascertain or attempt to get more accurate figures for precincts of St. Louis County? A Would you strike that question and let me continue with the answer to your other question?

Q O.K. A To be more specific on March 24th I got the information on Jackson County outside of Kansas City. I do have that particular date, March 24th. So that would just about pinpoint them. We got them all within a week of that time.

Q My question is this: did the committee attempt to get census bureau population figures for the precincts of the townships of St. Louis County? A Of St. Louis County?

Q Yes. A I am quite sure we did, but I don't think we ever got any specific figures on those precincts.

Q Did the committee ever seek to get these precinct populations from the Census Bureau? A Not from the Census Bureau. Some members of the committee did.

Q From the Census Bureau? A Mr. Johnson of St. Louis County had figures and I am quite sure he got them from the Census Bureau. I know that Mr. Young in the city of St. Louis got figures from the Census Bureau.

Q But I am speaking now of the precincts of St. Louis County, not the townships of St. Louis County. There are, as you know, 1500, more or less, precincts in St. Louis County. These are precincts now of the townships. A I am going to answer that this way and it's only my best recollection, that there was no census figures for precincts as they existed in 1966.

Q But did the committee make any attempt to get them from the Census Bureau? A I can only say that I did not because I had appointed subcommittees and they came in with certain figures.

Q But they didn't bring back official Census Bureau figures of the precincts? A No, sir, not that I recall.

MR. PREISLER: All right, thank you.

MR. WOOD: I neglected to offer Defendants' Exhibit A into evidence and I now do so.

MR. COLLINS: We have no objection.

MR. PREISLER: I offer an objection on the ground the figures in a number of instances are incorrect.

REDIRECT EXAMINATION

by Mr. Wood:

Q Senator Avery, I show you Defendants' Exhibit D, for identification, and ask you to identify that, please. A That is a map of the county, the City of St. Louis and St. Louis County, the townships of St. Louis County have indications of populations set out in red figures. This map was received by me from Senator Jones of St. Louis County and was in this present condition when I received it.

Q Now, was this Defendants' Exhibit D received by you during or prior to the Senate committee on Reapportionment deliberations on Senate Bill No. 182? A It was during

the deliberations while it was still in committee and at about the same time these maps all came within a few days of each other, so we'll say March 24th approximately.

Q Senator Avery, these populations, or these numerals that are shown in red, for what is apparently each township in St. Louis County, these were on the map when you received it? A They were on the map when I received it and those are the figures we adopted.

Q That you used? A Yes, sir.

Q Did you personally make any effort to verify the accuracy of these figures as populations of townships? A Yes, I had a piece of paper, a sheet of paper which was furnished by the Census Bureau setting out, and which was given to me by Senator Young, however, setting out the populations in the various townships, and I think these do conform.

Q This paper you refer to, the one that Senator Young gave you, do you know whether that paper came from the Census Bureau? A I could not say I know. It was so represented to me.

Q By Senator Young? A Yes.

MR. WOOD: Defendants' Exhibit D if offered into evidence.

MR. COLLINS: We have no objection.

MR. PREISLER: I think it should state the source of those figures. I think we are agreed where they came from, are we not?

MR. WOOD: Will the parties agree that the numerals within the township, the red numerals within the townships on Defendants' Exhibit D correspond with the populations of the townships as they are reflected in stipulated Exhibit No. 23?

MR. COLLINS: Yes, we will so agree.

MR. PREISLER: That is agreed.

MR. COLLINS; I take it with that statement, Mr. Preisler, you have no objection to Exhibit D?

MR. PREISLER: That is correct.

CROSS-EXAMINATION

by Mr. Collins:

Q Senator, when were you first elected to the Missouri State Senate? A In 1956.

Q And have you continuously been a member of that body since that date? A Yes, sir.

Q Prior to that time, have you had any experience in the legislature? A I had been in the House three terms, elected there in 1950.

Q So you have been a member of the Missouri Legislature continuously since 1950? A Yes, sir.

Q Now, during your tenure in the Senate, did you have any experience in connection with the districting or apportionment of the Congressional districts in 1961? A I was chairman of the Reapportionment Committee that year.

Q And did you have any experience with the reapportionment of 1965? A I was again chairman of that committee.

Q And, of course, chairman in 1967? A In 1967, yes, sir.

Q So you have had long experience not only in the legislature but specifically with reapportionment? A Yes.

Q Now, as I understand it, in the legislature, of course, and any bill, particularly apportionment, but any bill you have the practical problem of getting it passed? A Yes, sir; that is the problem.

Q Whatever happens over there, nothing counts, as far as law is concerned, unless it is passed? A That is correct.

Q And this 1967 Congressional Redistricting Act is, as I understand it, in your opinion, the best bill in terms of minimal variations that could be passed and is the product of a lot of hard work and debate and work on the part of the legislature. A It certainly is, and it represents a lot of thoughts, a lot of different ideas from all parts of the state of Missouri.

Q And in all of those debates and the drafting of the bill and the amending of it and the discussions of it, I understand from your testimony, I want to make sure this is correct, that the primary consideration was equality of population, amongst and between the various districts.

MR. PREISLER: Objection on the grounds this would be a conclusion of the witness. He could speak for himself but he can't speak for the other great numbers in the legislature.

WITNESS AVERY: I would say as far as I am personally concerned that was the primary consideration and the secondary consideration and very close to the primary, was trying to get as regular shaped districts as possible.

Q (by Mr. Collins) Well, it is your opinion, Senator Avery, that this was the primary consideration of the legislature as a whole?

MR. PREISLER: Objection again.

WITNESS AVERY: My answer to that would be that the members of the legislature recognized the fact at this time the legislature had to give prime consideration to equality in population as nearly as it could.

Q (by Mr. Collins) And in your opinion, they did? A And they did so; yes, sir.

MR. COLLINS: That is all, thank you.

REDIRECT EXAMINATION

by Mr. Wood:

Q Senator Avery, Mr. Preisler has asked you about populations for the precincts and the townships in St. Louis County. Did your committee at any time contemplate splitting the townships in St. Louis County? A No.

Q Insofar as the Congressional Districts were concerned? A No, our committee did not.

CROSS-EXAMINATION

by Mr. Preisler:

Q Mr. Avery, they actually have split the townships.

MR. WOOD: I said did your committee—

Q (by Mr. Preisler) Your committee only used whole townships at any time? A Where we were considering it in committee. Now, when this bill was reported out of the committee and went to the Senate, then it never came back to our committee again, you see.

Q I am merely trying to find out whether your committee had before it official census data for the precincts of these townships because the townships were split and the question was how they got the population of the split township. A Now, my recollection of it is, in the Senate committee, we did not split any township and we did not have the population data of the precincts because we did not have them before us.

MR. PREISLER: I see.

RE-DIRECT EXAMINATION

by Mr. Wood:

Q Senator Avery, in your bill as originally introduced, did you calculate as best you could the populations of the respective districts, and if so, could you tell us what those were? A Now this is just the original bill as I introduced it. Shall I give you the figures?

Q Would you please? A As I have them here, District No. 1, 423,712; District No. 2, 444,462; District No. 3, 448,824; District No. 4, 428,113; District No. 5, 430,412; District No. 6, 427,710; District No. 7, 428,173; District No. 8, 426,260; District No. 9, 427,313; and District No. 10, 432,281.

Now let me explain again as I did before, that these figures are based solely on the 1960 populations of the townships, wards and what have you. They are based on those 1960 figures. That was before we got any of the revised figures after the changes in townships and wards.

MR. PREISLER: You mean this is your original 182 bill?

WITNESS AVERY: That is the original 182 bill.

Q (by Mr. Wood) Utilizing the 1960 wards and townships, St. Louis County and St. Louis City? A That is my notation on the bill and that was made at the time, based on the 1960 composition and census of St. Louis wards and St. Louis County townships.

MR. WOOD: I have no further questions.

MR. COLLINS: I have none.

RECROSS EXAMINATION

by Mr. Preisler:

Q What was the date of that bill approximately? A That bill was introduced and read the first time on January 26.

Q Those figures were compiled at that time? A I would say a few days before that; yes, sir.

MR. PREISLER: No further questions.

(Signature waived.)

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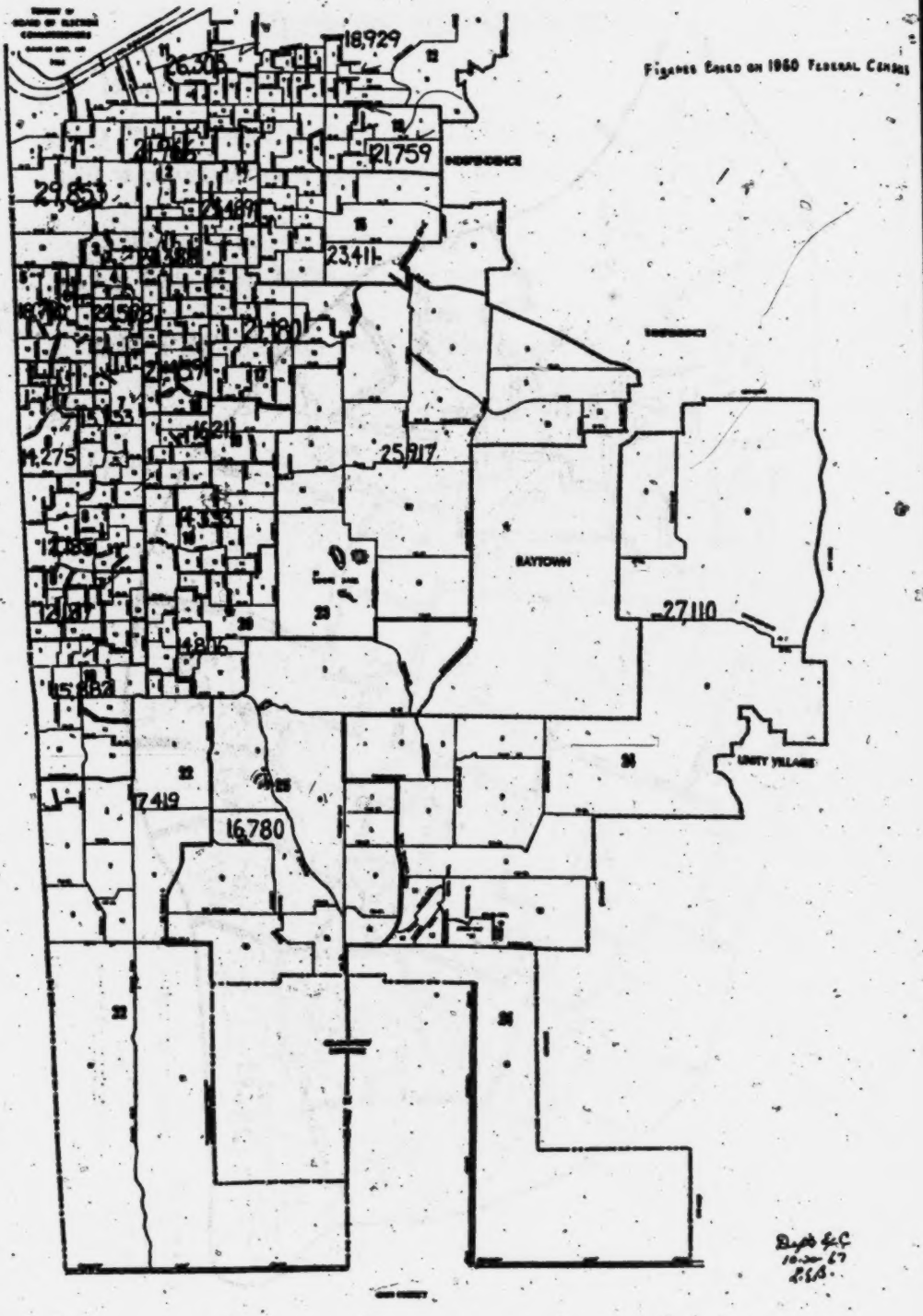
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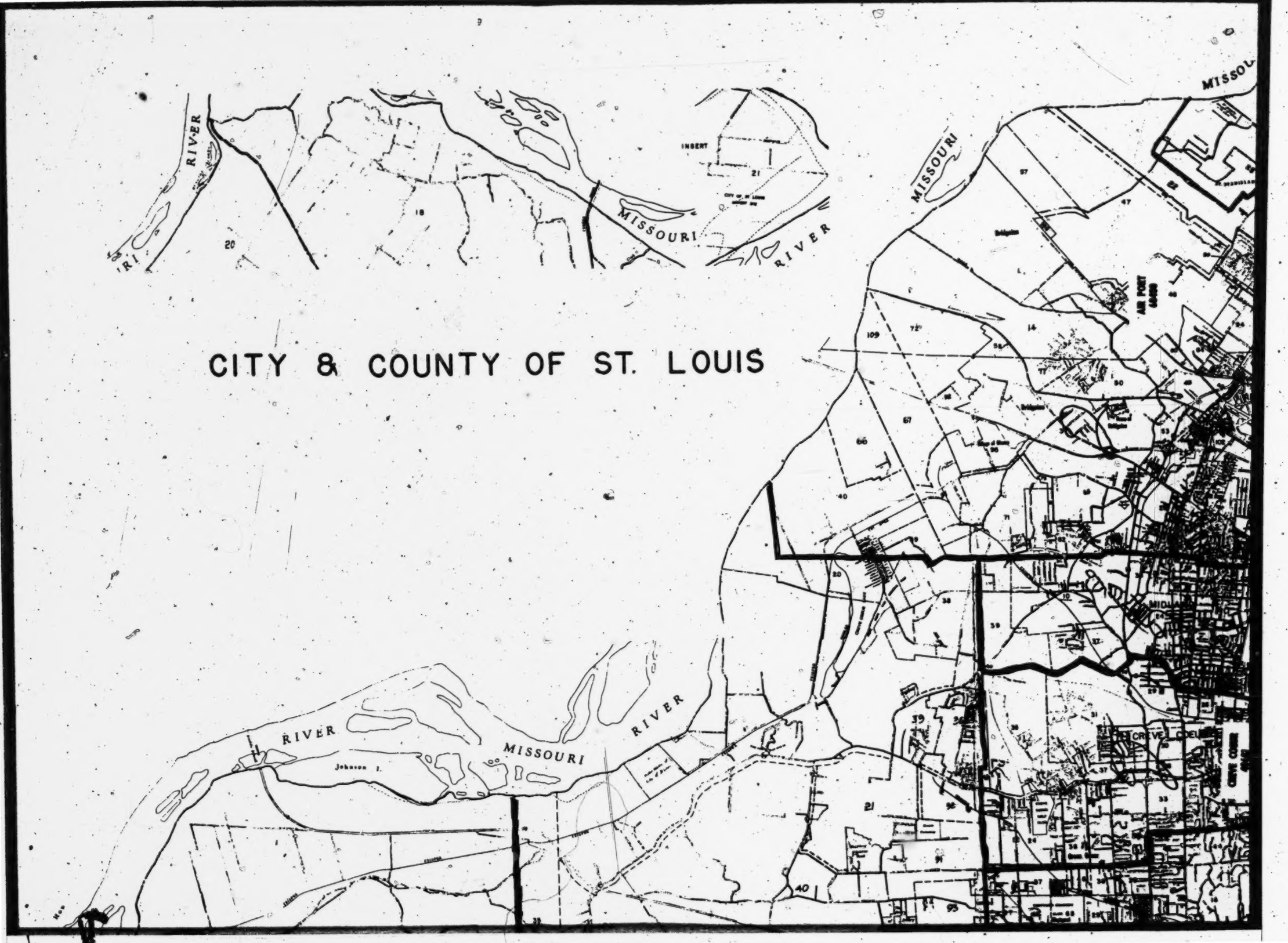
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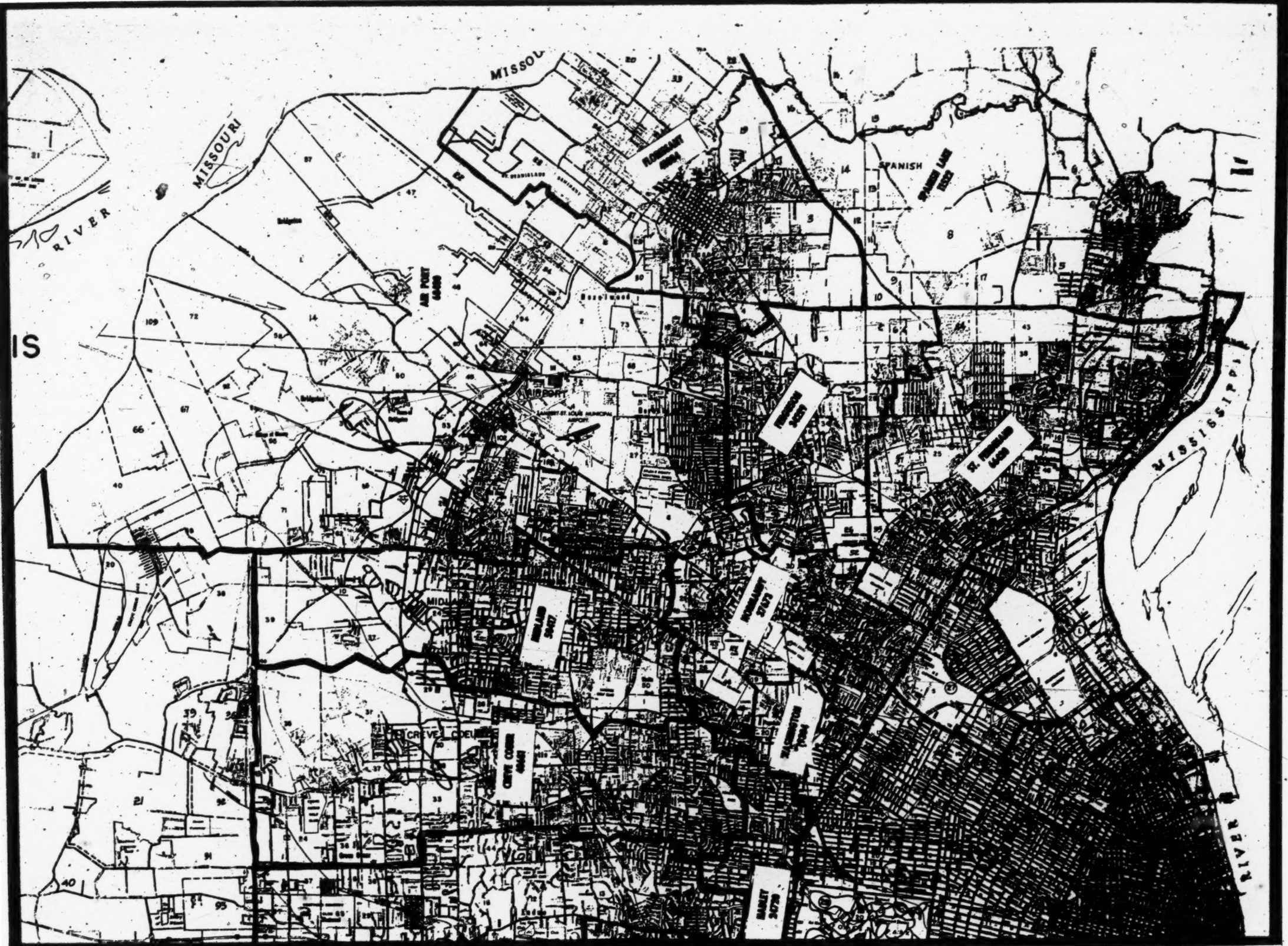
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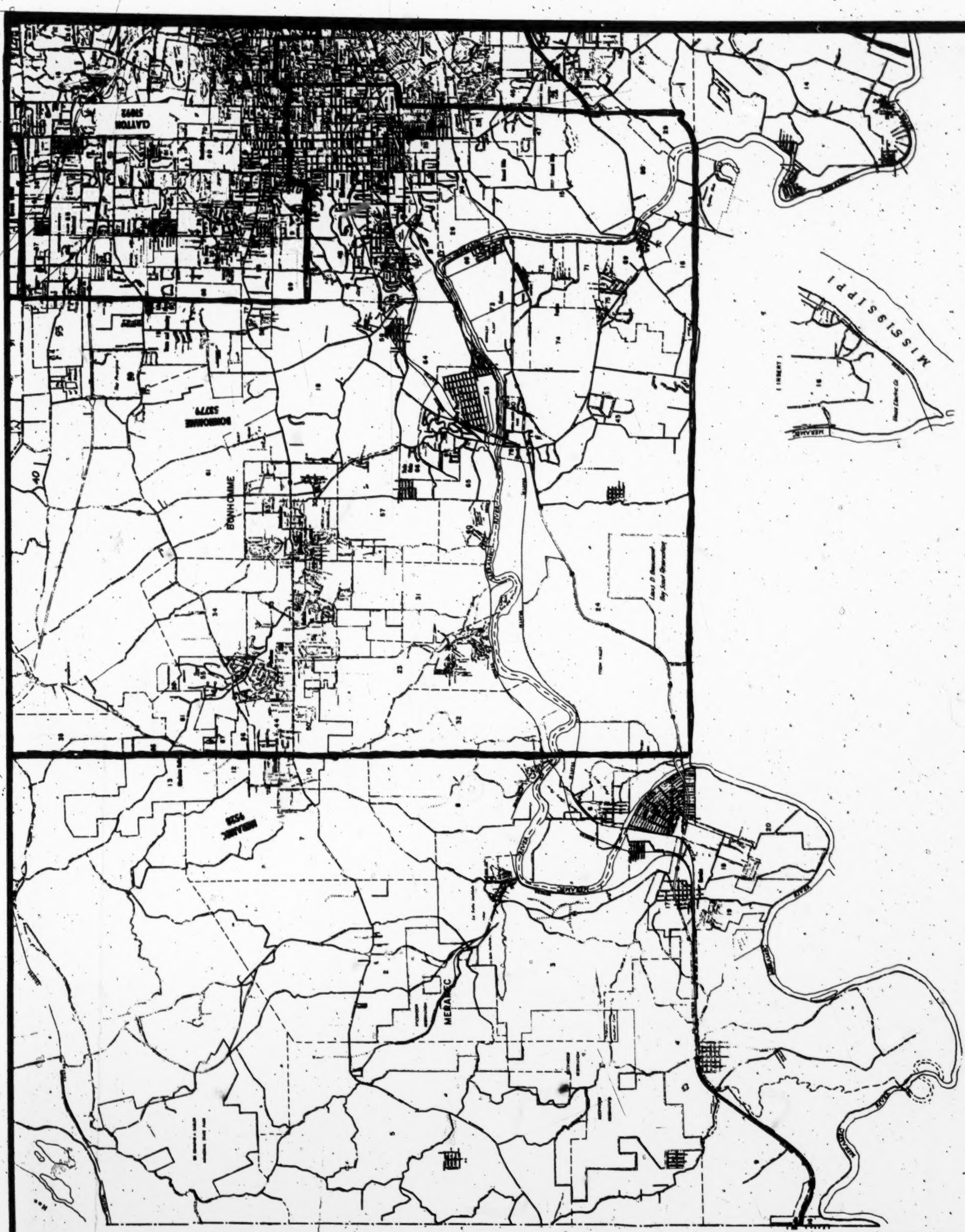
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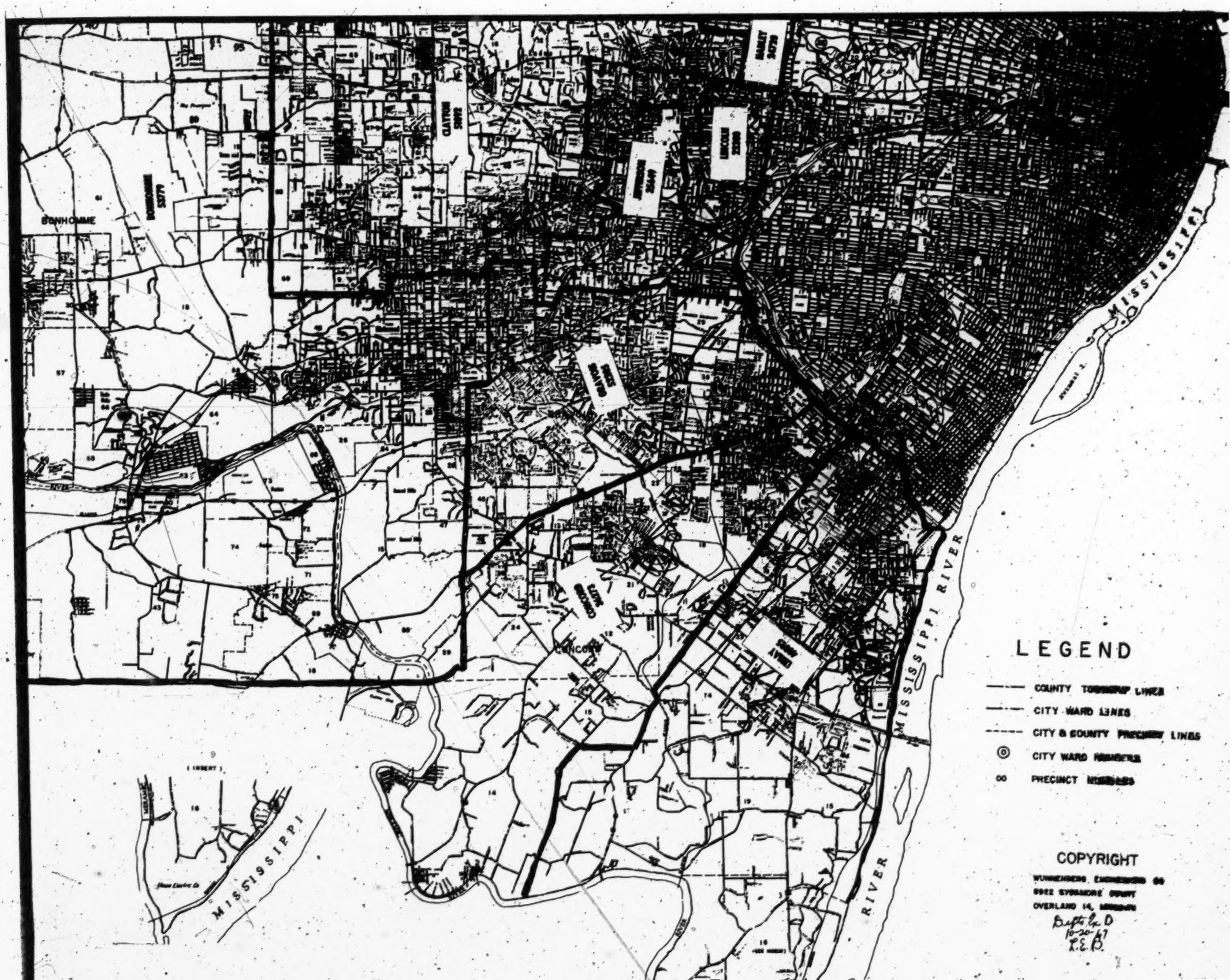
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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

(TITLE OMITTED IN PRINTING)

MOTION TO STAY ORDER, JUDGMENT AND DECREE PENDING APPEAL.

Defendants move the court as follows:

1. The court's opinion, judgment and decree issued in this cause on December 29, 1967, found that the 1967 Missouri Congressional Redistricting Act, House Substitute for Senate Committee Substiture for Senate Bill No. 182, 74th General Assembly of the State of Missouri, did not comply with Article I, Section 2, of the Constitution of the United States, and was therefore, unconstitutional and void.

2. On January 12, 1968, defendants filed in this court a Notice of Appeal to the Supreme Court of the United States from the order, judgment and decree entered in this action on December 29, 1967.

3. The imminent pendency of elections for the office of Representative in Congress in 1968 necessitates a stay of the court's judgment and decree entered on December 29, 1967, and a suspension of its orders entered therein.

WHEREFORE, Defendants pray that the court enter its order staying its judgment and decree, together with its orders issued therein on December 29, 1967, pending final disposition of the appeal herein to the Supreme Court of the United States.

Respectfully submitted,

NORMAN H. ANDERSON
Attorney General

/s/ THOMAS J. DOWNEY
First Ass't. Attorney General

/s/ LOUREN R. WOOD
Assistant Attorney General
Supreme Court Building
Jefferson City, Missouri
Attorneys for Defendants.

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

(TITLE OMITTED IN PRINTING)

STATEMENT IN SUPPORT OF DEFENDANTS' MOTION TO STAY ORDER, JUDGMENT AND DECREE PENDING APPEAL.

This court's opinion and judgment entered on December 29, 1967, found that the 1967 Congressional Redistricting Act does not comply with the requirements of Article I, Section 2, of the Constitution. The 1965 Act was declared by this court to be unconstitutional in what has been referred to for purposes of identification as Preisler II. This decision was upheld by the Supreme Court of the United States. Under the 1965 Act the largest congressional district contained approximately 20 per cent more people than the smallest district.

The 1967 Act was a bona fide effort by the General Assembly to comply with the requirements of Article I, Section 2, of the Constitution as construed by Preisler II. There is not a scintilla of evidence or information which indicates that the legislature was acting in any manner other than good faith performance to comply with the Constitution in drafting the 1967 Act. No specific guidelines were outlined in Preisler II from which the legislature could proceed with certain knowledge that the final product of the legislative action would meet constitutional requirements. After a long drawn out legislative give and take upon this subject a bill was enacted in which the largest congressional district contained only 6 per cent more population than the smallest congressional district. No defiance of the court is in any way indicated in this legislative product, and it is nowhere ob-

served that the legislature in its deliberations set variances in numbers or percentages above and below an average ideal district as its goal. It is true that the results of different plans and amendments to plans were measured in percentage terms in the legislative process for the purpose of the legislature informing itself as to whether or not the resulting districts appeared to be within the realm of reason insofar as population equality is concerned. This emphasizes the bona fides of the legislative attempt to comply with the judicial mandate.

The legislature has now been told that its efforts did not come up to the constitutional standards of population equality which the court considers to be necessary. The defendant do not agree with this construction of Article I, Section 2 of the Constitution, and an appeal has been taken to the Supreme Court of the United States. No apportionment case of any kind has been before the Supreme Court of the United States for decision with population variations as minor as those reflected by the 1967 Act. Wesberry v. Sanders was decided in 1964, and the Supreme Court has never implemented this decision by accepting any subsequent case for argument and opinion. See Rockerfeller v. Wells, No. 691, Dec. 18, 1967, —— U.S. ——, dissent of Justice Harlan. The population variations condemned in Wesberry v. Sanders and the population variations in the 1967 Missouri Act are poles apart. The experience of the Missouri General Assembly in 1967 demonstrates a dramatic and urgent need for the Supreme Court of the United States to consider further and issue an opinion directly upon the subject of congressional redistricting in the context of this far different factual situation in order that Missouri and all of the states may have guidelines which are definite and certain in the establishment of congressional districts. The need for such guidelines is demonstrated by the fact that many district

courts have found congressional redistricting plans with variations much greater than those in the Missouri 1967 Act to be valid. Therefore, this appeal is being pursued with extraordinary care and diligence in the anticipation that the case will be accepted by the Supreme Court for argument and opinion.

Missouri law requires the prospective candidates for Congress to file a declaration of their candidacy for the primary election not later than April 30, 1968. A special session of the Missouri legislature convenes on January 12, 1968, for the primary purpose of appropriating funds for the operation and expenses of the state government for the fiscal year beginning July 1, 1968. This special session is required by the Constitution to complete its work within 60 days. The subject of congressional redistricting is being submitted by the Governor to the special session for its consideration. The Constitution provides that laws enacted at such a special session will take effect 90 days after the session closes. Therefore, any congressional redistricting act passed by the special session can not take effect by April 30, 1968, unless an emergency clause is attached to such law. An emergency clause requires a two-thirds vote of the constitutional membership of each House of the General Assembly. The 1967 Act was able to muster a one vote constitutional majority for passage in the House. Therefore, it is probable that any legislation on congressional redistricting during the special session may have great difficulty in finding a two-thirds vote support for an emergency clause.

The judgment of December 29, 1967, retains jurisdiction of the subject matter. Any congressional redistricting act that may be passed in the special session, even though it may carry an emergency clause, will be subject to the approval of this court before prospective candidates can pursue election under the new districts. The stringent requirements for

congressional districts as provided in this court's opinion of December 29, 1967, (if any better plan is brought to the attention of the legislature, the plan adopted is presumptively unconstitutional) leads defendants to refrain from predicting that any plan enacted will gain judicial approval.

Assuming that legislative efforts to enact a new congressional redistricting law fail, or assuming that this court cannot give its approval to a new law, the court will draw new districts. It is further assumed that the court would want to permit all of those interested to be heard and to offer evidence before the court established congressional districts. Obviously the judicial creation of congressional districts must of necessity by the nature of the subject matter be time consuming.

The practical necessities attendant to the conduct of an election demonstrate the extreme difficulty or impossibility of an orderly and intelligently conducted election for congressmen in the State of Missouri in 1968 under the many uncertainties which have been discussed.

Defendants are pursuing this complicated, delicate and sensitive appeal with diligence and urgency. Time is required to prepare the record. Defendants' jurisdictional statement must be prepared with the utmost care and thoroughness. If the court should summarily affirm the lower court upon consideration of the jurisdictional statement and a motion to affirm, the case may be decided prior to April 30, 1968. However, if the court notes probable jurisdiction, orders the record printed, provides for filing of briefs and dockets the case for argument, it is improbable that the case can be heard prior to the October Session in 1968.

The court's decision as to whether or not a stay should be granted must be made in the exercise of its equitable discretion. See Eagle Pitcher Co. v. Sperry (W.D.Mo. 1964),

227 F.Supp. 153; Taylor v. Board of Education (S.D.N.Y. 1961), 195 F.Supp. 231. If the factual situation as demonstrated by the 1967 Congressional Redistricting Act convinces the court that the election of members of congress under that Act will be accomplished at the cost of undue, serious and substantial dilution of voting rights in the more populous congressional districts, then the court should deny this request for a stay. However, in view of the fact that the population of the largest district is only 6 per cent in excess of the population of the smallest district under the 1967 Act, it is defendants' firm conviction that undue, serious and substantial dilution of the voting rights of voters in the largest district will not result if elections are permitted to be conducted in 1968 under the 1967 Act. This conviction apparently is shared by one member of this court who dissented from the decision upon the grounds that he considered the population disparities to be minor and constitutionally permissible. It may be that the Supreme Court of the United States will support the majority view that these population variations are constitutionally impermissible. However, the doubt and uncertainty surrounding the correct application of constitutional principles to the 1967 Act, coupled with the obviously minor (almost infinitesimal) vote dilution inherent in the Act, lends stout support to the exercise of equitable discretion by this court in granting defendants motion to stay.

It is respectfully submitted that defendants' motion to stay the judgment and decree, and to suspend the orders set

forth therein, pending disposition of the appeal by the Supreme Court of the United States should be granted.

Respectfully submitted,

NORMAN H. ANDERSON
Attorney General

/s/ THOMAS J. DOWNEY
First Ass't. Attorney General

/s/ LOUREN R. WOOD
Assistant Attorney General
Supreme Court Building
Jefferson City, Missouri
Attorneys for Defendants.

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

NOTICE OF APPEAL FROM FEDERAL COURT, CIVIL CASE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

(TITLE OMITTED IN PRINTING)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

I. Notice is hereby given that the Secretary of State of Missouri and the Attorney General of Missouri, the defendants above named, hereby appeal to the Supreme Court of the United States from the final judgment and decree (including the opinion of court and the appendices attached thereto incorporated by reference in the judgment and decree), entered in this action on December 29, 1967.

This appeal is taken pursuant to 28 U.S.C., Section 1253.

II. The clerk will please prepare a transcript of the entire record in this cause for transmission to the clerk of the Supreme Court of the United States.

III. The following questions are presented by this appeal:

I.

The opinion, decision and judgment appealed from erroneously construed Wesberry v. Sanders, 376 U.S. 1 (1964) by finding that congressional districts are not as equal in population as practicable if any other plan proposed to the legislature or to the court can result in districts with smaller population variations.

II.

The opinion, decision and judgment appealed from is in

conflict with Wesberry v. Sanders, supra, Reynolds v. Sims, 377 U.S. 533 (1964), Swann v. Adams, 385 U.S. 440 (1967), and Preisler v. Secretary of State of Missouri, 257 F.Supp. 953 (W.D.Mo. 1966), aff'd. sub nom. Kirkpatrick v. Preisler, 385 U.S. 450 (1967), by rejecting the principle that population variations between congressional districts which are de minimis are constitutionally permissible.

III.

The opinion, decision and judgment appealed from has misconstrued the burden of proof principles set forth in Swann v. Adams, supra, and Kilgarlin v. Hill, 386 U.S. 120 (1967), by holding that minor variations in the population of congressional districts are constitutionally impermissible in the absence of competent and substantial evidence justifying the variations.

IV.

The opinion, decision and judgment appealed from erroneously rejected the authority of Connor v. Johnson, Civil No. 3830, S.D.Miss., Sept. 28, 1966, aff'd. 386 U.S. 483, (1967) which was relied upon by appellants in support of the constitutionality of the 1967 Missouri Congressional Redistricting Act.

V.

The opinion, decision and judgment appealed from is erroneous and in conflict with Reynolds v. Sims, supra, Swann v. Adams, supra, and Kilgarlin v. Hill, supra, in holding that in establishing congressional districts no allowance can be made for legislative interplay and that any population deviations from absolute mathematical equality between congressional districts attributable to political compromise within the state legislature is arbitrary and discriminatory and invalidates such legislation. The opinion renders nugatory considerations other than population which may be recog-

nized by the legislature in drawing congressional districts as provided by Reynolds v. Sims, supra, Swann v. Adams, supra, and Kilgarlin v. Hill, supra.

VI.

The opinion, decision and judgment appealed from erroneously finds that there is an overvaluation and overweight of votes in the rural geographic areas as contrasted with the votes in metropolitan areas in the composition of the congressional districts. This conclusion and others are based, to some extent, on inaccuracies in the Findings of Fact.

VII.

The opinion, decision and judgment appealed from erroneously found that the 1967 Missouri Congressional Redistricting Act, House Substitute for Senate Committee Substitute for Senate Bill No. 182, 74th General Assembly of the State of Missouri, does not comply with Article I, Section 2, Constitution of the United States and is unconstitutional and void. Population was the principal factor considered by the legislature in enacting this law, and the minor variations in the populations of the resulting congressional districts fully comply with the constitutional requirement that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's. The 1967 Missouri Congressional Redistricting Act complies with Article I, Section 2, Constitution of the United States, is in harmony with all applicable constitutional principles and is valid.

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(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

(TITLE OMITTED IN PRINTING)

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO STAY ORDER, JUDGMENT, AND DECREE, PENDING APPEAL.

Plaintiffs oppose the motion of Defendants which prays that the Court "enter its order staying its judgment and decree, together with its orders issued therein on December 29, 1967, pending final disposition of the appeal herein to the Supreme Court of the United States."

The subject of congressional redistricting has been submitted to the General Assembly by the Governor for the special session now in session which convened on January 12, 1968. This special session is limited to sixty days.

This same General Assembly considered congressional districting at its regular session in 1967 and enacted the Act now held to be unconstitutional and void by the order, judgment, and decree of this Court. Having thus previously quite extensively considered the subject, it seems reasonable that very little time would be needed by the General Assembly to make the necessary adjustments in the district populations to bring the district populations to very low minimal variations or differences.

The last filing date for candidates for the office of Representative in Congress in Missouri is April 30, 1968. The date of the primary election is August 6, 1968. If the General Assembly promptly passes an Act (with emergency clause) which has the approval of the Governor, and which meets the constitutional requirements as construed by the courts,

there would be ample time for the filing of candidates' declaration papers long before the April 30th deadline.

Concerning the emergency clause, it is inconceivable to Plaintiffs that the General Assembly, having passed a congressional districting Act by the required majority, would attempt to defeat the majority will by stubbornly refusing to render the Act immediately effective by failing to pass the necessary emergency provisions.

However, even if the General Assembly passed the Act on the last day of the special session, March 11, 1968, without an emergency provision, and the Governor approved the Act, the Act would become effective ninety days thereafter, June 9, 1968. Since the primary election is scheduled to take place about two months thereafter, the Secretary of State might prospectively accept declaration of candidacy filings through April 30, 1968 as the statutes now provide, since the districts would be in effect at the time of the primary election.

Defendants in their "Statement in Support of Defendants' Motion", on page 5 thereof, urge the Court to exercise its equitable discretion. In the same lengthy paragraph, Defendants simply re-argue one of the principal issues of this case, saying, "If the factual situation as demonstrated by the 1967 Congressional Redistricting Act convinces the court that the election of members of congress under the Act will be accomplished at the cost of undue, serious and substantial dilution of voting rights in the more populous congressional districts, then the court should deny this request for a stay." Plaintiffs contend that the Court has already made this determination and, therefore, the stay should be denied as a matter of course.

Defendants in the same paragraph further state, "However, the doubt and uncertainty surrounding the correct ap-

plication of constitutional principles to the 1967 Act, coupled with the obviously minor (almost infinitesimal) vote dilution inherent in the Act, lends stout support to the exercise of equitable discretion by this court in granting defendants' motion to stay."

Defendants apparently hope to influence the Court to exercise its equitable discretion by the use of such exaggerated terms which simply cannot be validly applied to such population differences between adjacent districts as, for example, the 25,802 (between the 8th and 4th districts) and the 21,655 (between the 8th and 10th) when whole counties of about 10,000 population could easily be transferred from one district to an adjacent district and make each closer to population equality. Plaintiffs contend that population differences of such magnitude, when they could easily be greatly diminished, do not establish a sound basis for the exercising equitable relief under the factual timing circumstances now existing.

WHEREFORE, Plaintiffs pray that Defendants' Motion referred to herein be overruled and the stay sought by Defendants be denied.

Respectfully submitted,

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(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

(TITLE OMITTED IN PRINTING)

INTERVENOR-DEFENDANTS' NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

I. Notice is hereby given that F. V. Heinkel, R. J. Rosier, W. W. Beckett, A. D. Sappington, L. O. Wallis, Miller Hern, Herman Hetlage, Herman Kertz, Turpin Youtsey and Glen Myers, the Intervenor-Defendants above named, hereby appeal to the Supreme Court of the United States from the final judgment and decree (including the opinion of the court and the appendices, findings of fact, conclusions of law, attached thereto and incorporated by reference in the judgment and decree), entered in this action on December 29, 1967.

II. This appeal is taken pursuant to 28 U.S.C., Section 1253.

III. The clerk will please prepare a transcript of the entire record in this cause for transmission to the clerk of the Supreme Court of the United States.

IV. The following questions are presented by this appeal:

1.

Does the Missouri 1967 Congressional Redistricting Act (Sections 128.202 to 128.303 V.A.M.S., 1967) under which the average variation from ideal is 1.6%, the ratio of the largest to the smallest district is 1.06% to 1, 59% of the total population of the state is required to elect a majority (6 out of 10) of the congressional delegation, the largest variation from ideal was 3.13% above (the district which contains approximately 35,000 soldiers at Fort Leonard Wood, the state capitol at Jefferson City and approximately

17,000 students at the University of Missouri at Columbia) and the lowest was 2.84% below, one-half of the districts are above ideal and one-half of the districts are below ideal, 7 of the 10 districts are within 1.88% of ideal, violate Article 1, §2 of the United States Constitution as construed in Wesberry v. Sanders, 376 U.S. 1 (1964)?

2.

In Connor v. Johnson, No. 3830 decided by a three judge court in the Southern District of Mississippi on September 28, 1966, and affirmed by the Supreme Court at 386 U.S. 483 (1967), the average variation from the ideal population per district, the disparity ratio and the maximum and minimum variations were greater than those which resulted from Missouri's 1967 Act. That being true, does the judgment appealed from herein result in the application of a double standard by the Federal Judiciary? That is, that which is permissible in Mississippi is not permissible in Missouri?

3.

Does the doctrine of de minimis apply to congressional reapportionment, as suggested by the lower court herein in Preisler II, 257 Fed. Supp. 953 (1966) and, if so, do the population variations resulting from the Missouri 1957 Act violate that doctrine?

4.

Is there a presumption that the Missouri 1967 Act is constitutional and do those asserting unconstitutionality have the burden of demonstrating it?

5.

The undisputed testimony of the officers of the legislature was that the Act, as passed, apportioned the population as nearly equal as is "practicable", from the standpoint of getting an Act passed. There was no evidence to the contrary, although plaintiff-appellees served notice that they

would introduce evidence at the hearing they elected not to do so. This being true and the average variation from ideal being only 1.6%, the disparity ratio being only 1.06% to 1, 7 of the 10 districts being within 1.88% of ideal and the maximum variations being 3.13% above and 2.84% below, was it proper for the lower court to declare the Act unconstitutional?

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Attorney for Intervenor-Defendants.

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

(TITLE OMITTED IN PRINTING)

MOTION TO STAY ORDER, JUDGMENT AND DECREE PENDING APPEAL.

Come now F. V. Heinkel, R. J. Rosier, W. W. Beckett, A. D. Sappington, L. O. Wallis, Miller Hern, Herman Hetlage, Herman Kertz, Turpin Youtsey and Glen Myers, Intervenor-Defendants, and state to the court:

1. That on January 22nd, 1968, they filed in this court a Notice of Appeal to the Supreme Court of the United States from the judgment, decree and orders entered in this action by this court on December 29, 1967.

2. That said Intervenor-Defendants desire a stay on appeal.

3. That under Missouri law the deadline for filing for candidacy for election to Congress is April 30, 1968; that some persons had filed for candidacy for election to Congress prior to this court's judgment, decree and orders of December 29, 1967; that other people are now desirous of filing their candidacy for election to Congress but are unable to do so because of this court's judgment, decree and orders, and also because they do not know in which Congressional District they reside; that the people of Missouri do not now know in which Congressional District they reside or will vote, or who will or might be candidates of any particular party for election to Congress in their district.

4. The court's judgment, decree and orders of December 29, 1967, held the Missouri 1967 Congressional Redistricting Act unconstitutional and void; that although the Missouri Legislature is now in special session and is considering

various bills concerning the re-establishment of the Congressional Districts of Missouri, under the Missouri Constitution it will take a two-thirds vote of both houses of the Legislature in order to make any bill passed effective prior to 90 days after the adjournment of the Legislature, which adjournment will not be until the 12th day of March, 1968.

Wherefore, Intervenor-Defendants move the court to stay its judgment, decree and orders entered herein on December 29, 1967, until after the 1968 Congressional elections, November 4, 1968.

Respectfully submitted,

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Attorney for Intervenor-Defendants.

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

(TITLE OMITTED IN PRINTING)

INTERVENOR-DEFENDANTS' SUGGESTIONS IN SUPPORT OF THEIR MOTION TO STAY ORDER, JUDGMENT AND DECREE PENDING APPEAL.

The Secretary of State has no authority to accept filings of candidacy for Congress after April 30, 1968. Plaintiffs' suggestion that if a new redistricting act is passed, and if it is passed by a two-thirds majority (with an emergency clause), and if the Governor signs it, that the Secretary of

State could "prospectively accept" declarations of candidacy is wholly without support in law, and, in fact, would put the Secretary of State in contempt of this court for a direct violation of this court's order of December 29, 1967, which order directed that "no further filings be accepted" under the 1967 Act. There is no other Act under which they could be accepted.

The harm which will result if this court's judgment, decree and orders are not stayed is of much greater magnitude than the harm that will result by holding the 1968 election under the 1967 Act, even under the views expressed by the majority opinion. It is respectfully suggested that in the interest of justice the motion to stay until the 1968 election be sustained.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

JAMES C. KIRKPATRICK, Secretary of State of Missouri, and NORMAN H. ANDERSON, Attorney General of Missouri,

Appellants,

vs.

PAUL W. PREISLER, LOUISE ERBE, BOSTIC J. FRANKLIN, LUCILE RIEDEL, DOROTHY CHILDS, SARAH RIFKIN, and MARTHA LEONARD,

Appellees.

On Appeal from the United States District Court For the Western District of Missouri Central Division.

JURISDICTIONAL STATEMENT.

PRELIMINARY STATEMENT.

This is an appeal from the opinion, judgment and decree of the United States District Court for the Western District of Missouri, Central Division, entered on December 29, 1967, decreeing that the 1967 Missouri Congressional Redistricting Act is unconstitutional and void. A three-judge court was convened to hear this cause and the judgment appealed from was concurred in by two members of the court, viz., the Honorable John W. Oliver, and the Honorable William R.

Collinson, Judges of the United States District Court for the Western District of Missouri. The third member of the court, the Honorable M. C. Matthes, Judge of the United States Circuit Court of Appeals for the Eighth Circuit, dissented from this judgment. This statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW.

The judgment of the court and the opinion appealed from are not yet reported. Appellants have filed, together with this jurisdictional statement, a separate document entitled Appendices to Jurisdictional Statement. The opinion, judgment and decree appealed from is set forth in said Appendices as Appendix A. The Findings of Fact and Conclusions of Law of the judgment appealed from are set forth in said Appendices as Appendix B. The dissenting opinion of the Honorable M. C. Matthes is set forth in said Appendices as Appendix C. The clarifying comments of the Honorable William R. Collinson are set forth in said Appendices as Appendix D.

The judgment and opinion appealed from are sequels to **Preisler v. Secretary of State of Missouri**, W.D.Mo. 1965, 238 F.Supp. 187, decided January 4, 1965, and **Preisler v. Secretary of State of Missouri**, W.D.Mo. 1966, 257 F.Supp. 953, decided August 5, 1966, affirmed sub nom. **Kirkpatrick v. Preisler**, 385 U.S. 450.

Upon the motion of appellants, the lower court entered its memorandum and order staying its judgment and decree pending final disposition of the appeal in this court which is set forth in said Appendices as Appendix E.

JURISDICTION.

This suit involves the constitutionality of a State statute

under Article I, Section 2, of the Constitution of the United States, and was required to be adjudicated by a three-judge court under Sections 2281 and 2284 of Title 28, United States Code. The judgment of the District Court, which was entered on December 29, 1967, declared the State statute to be unconstitutional, declared filings for the House of Representatives to the United States Congress pursuant to said statute to be null and void and prohibited appellants from accepting further filings under the statute. Notice of Appeal was filed in the lower court on January 12, 1968. The jurisdiction of the Supreme Court to review this decision by direct appeal in this case is sustained by **Wesberry v. Sanders**, 374 U.S. 802.

STATUTE INVOLVED.

The judgment and decree appealed from found that the 1967 Missouri Congressional Redistricting Act, Sections 128.203 to 128.305, inclusive, Missouri Revised Statutes, Cumulative Supplement 1967, pages 374 and 375, does not comply with Article I, Section 2, of the Constitution of the United States, and is therefore, unconstitutional and void. The 1967 Missouri Congressional Redistricting Act is set forth in Appendices to Jurisdictional Statement as Appendix F.

QUESTIONS PRESENTED.

1.

The opinion, decision and judgment appealed from erroneously construed **Wesberry v. Sanders**, 376 U.S. 1 (1964), by finding that congressional districts are not as equal in population as practicable if any other plan proposed to the Legislature or to the court can result in districts with smaller population variations.

2.

The opinion, decision and judgment appealed from is in conflict with **Wesberry v. Sanders**, supra, **Reynolds v. Sims**,

377 U.S. 533 (1964), **Swann v. Adams**, 385 U.S. 440 (1967), and **Preisler v. Secretary of State of Missouri**, 257 F.Supp. 953 (W.D.Mo. 1966), aff'd. sub nom. **Kirkpatrick v. Preisler**, 385 U.S. 450 (1967), by rejecting the principle that population variations between congressional districts which are de minimis are constitutionally permissible.

3.

The opinion, decision and judgment appealed from has misconstrued the burden of proof principles set forth in **Swann v. Adams**, supra, and **Kilgarlin v. Hill**, 386 U.S. 120 (1967), by holding that minor variations in the population of congressional districts are constitutionally impermissible in the absence of competent and substantial evidence justifying the variations.

4.

The opinion, decision and judgment appealed from erroneously rejected the authority of **Connor v. Johnson**, Civil No. 3830, S.D.Miss., Sept. 28, 1966, aff'd. 386 U.S. 483 (1967), which was relied upon by appellants in support of the constitutionality of the 1967 Missouri Congressional Redistricting Act.

5.

The opinion, decision and judgment appealed from is erroneous and in conflict with **Reynolds v. Sims**, supra, **Swann v. Adams**, supra, and **Kilgarlin v. Hill**, supra, in holding that in establishing congressional districts no allowance can be made for legislative interplay and that any population deviations from absolute mathematical equality between congressional districts attributable to political compromise within the state Legislature is arbitrary and discriminatory and invalidates such Legislation. The opinion renders nugatory considerations other than population which may be recognized by the Legislature in drawing congressional districts

as provided by **Reynolds v. Sims**, supra, **Swann v. Adams**, supra, and **Kilgarlin v. Hill**, supra.

6.

The opinion, decision and judgment appealed from erroneously finds that there is an overvaluation and overweight of votes in the rural geographic areas as contrasted with the votes in metropolitan areas in the composition of the congressional districts. This conclusion and others are based, to some extent, on inaccuracies in the Findings of Fact.

7.

The opinion, decision and judgment appealed from erroneously found that the 1967 Missouri Congressional Redistricting Act, House Substitute for Senate Committee Substitute for Senate Bill No. 182, 74th General Assembly of the State of Missouri, does not comply with Article I, Section 2, Constitution of the United States, and is unconstitutional and void. Population was the principal factor considered by the Legislature in enacting this law, and the minor variations in the populations of the resulting congressional districts fully comply with the constitutional requirement that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's. The 1967 Missouri Congressional Redistricting Act complies with Article I, Section 2, Constitution of the United States, is in harmony with all applicable constitutional principles and is valid.

STATEMENT OF THE CASE.

As a result of the United States Census of 1960, the number of members to which the State of Missouri was entitled in the House of Representatives in the United States Congress was reduced from 11 to 10. In 1961 the Legislature of the State of Missouri by law divided the state into ten congressional districts for the election of members to the House

of Representatives. Following this court's decision in **Wesberry v. Sanders**, 376 U.S. 1 (1964), the constitutionality of the 1961 Missouri Congressional Redistricting Act became the subject of a civil suit in the United States District Court for the Western District of Missouri. If districts which were absolutely equal in population were established, each district would contain one-tenth of the population of the state or 431,981.3 people. Under the 1961 Act the largest district had a population of 506,454 or a population of 74,473 in excess of a mathematically ideal district. The smallest district had a population of 378,499 or a population of 53,482 less than a mathematically ideal district. The largest district had a population of 127,955 in excess of the population of the smallest district. In a decision rendered on January 4, 1965, the court found that the 1961 Act did not meet the requirements of Article I, Section 2, of the Constitution and was void. **Preisler et al. v. Secretary of State of Missouri, et al.**, 238 F.Supp. 187.

In 1965 the Legislature of the State of Missouri enacted a new congressional redistricting law. Under the 1965 Congressional Redistricting Act the population of the largest district was 474,985 or 42,914 persons in excess of a mathematically ideal district. The population of the smallest district was 390,240 or 41,741 persons less than a mathematically ideal district. The largest district had a population of 84,655 in excess of the population of the smallest district. The constitutionality of the 1961 Act became the subject of a civil suit in the United States District Court for the Western District of Missouri in **Preisler, et al. v. The Secretary of State of Missouri, et al.**, 257 F.Supp. 952. The court found that the 1965 Act did not meet the requirements of Article I, Section 2, of the Constitution and was therefore void. Upon appeal to this court the judgment of the lower court was affirmed in **Kirkpatrick v. Preisler**, 385 U.S. 450.

In 1967 the 74th General Assembly of the State of Missouri once again engaged in the task of drawing ten congressional districts for the state. Sixteen different congressional redistricting plans were considered by the Legislature. The first Bill was introduced on January 18, 1967. After considering the many plans before it, legislative deliberation had resolved itself down to two plans, and a Bill was enacted on June 27, 1967. The final enactment came after a deadlock had been broken between the two Houses of the Legislature upon the submission of a substitute Bill by the Majority Leader of the House of Representatives.

The 1960 United States census population figures were the starting point for the General Assembly in its legislative deliberations concerning congressional redistricting. The 1960 census figures were adhered to constantly in the consideration of the many plans before the General Assembly up to and including the final enactment of the 1967 Act.

The accurate application of 1960 census figures to proposed districts in the metropolitan areas of Kansas City, St. Louis and St. Louis County involved a number of difficulties. Ward lines and precinct lines in the cities of Kansas City and St. Louis had been changed subsequent to the 1960 census. Annexations had been made to Kansas City subsequent to the 1960 census. Township lines and precinct lines had been changed in the County of St. Louis subsequent to the 1960 census. Entire new townships had been created in St. Louis County increasing the total number of townships and the total number of precincts. Relating 1960 census data to the new ward, township and precinct boundaries in these areas was a task to which the occurrence of some errors was almost inevitable. Population data for Kansas City was submitted by the local election officials admittedly as estimated data.

Supporters of the Bill which was finally enacted informed the members of the Legislature that the populations of the various districts were as follows: (Appellants have added to the tabulation the population variations from an ideal district of 431,981, together with the per cent of such variation)

Congressional District	Population	Variation from Ideal	Per Cent of Variation
1	436,417	+ 4,436	+1.06%
2	442,302	+10,321	+2.39%
3	431,507	— 474	—0.11%
4	423,815	— 8,166	—1.89%
5	430,412	— 1,569	—0.36%
6	425,238	— 6,743	—1.56%
7	436,769	+ 4,788	+1.10%
8	439,984	+ 8,003	+1.85%
9	428,223	— 3,758	—0.87%
10	423,866	— 8,115	—1.88%

According to these population figures the largest district (No. 2) has a population of 18,487 in excess of the smallest district (No. 4), with a resulting ratio of largest district to smallest district of 1.04.

After the commencement of this litigation, it was discovered that population totals for the districts were inaccurately calculated by the sponsors of the compromise Bill. Correct population figures were obtained from the Bureau of Census with the agreement of all parties to the case. The correct population figures for these congressional districts, the variation is set out below.

Congressional District	Population	Variation from Ideal	Per Cent of Variation
1	439,746	+ 7,765	+1.79%
2	436,448	+ 4,467	+1.03%
3	436,099	+ 4,118	+0.95%
4	419,721	—12,260	—2.83%
5	431,178	— 803	—0.18%
6	422,238	— 9,743	—2.25%
7	436,769	+ 4,788	+1.10%
8	445,523	+13,542	+3.13%
9	428,223	— 3,758	—0.86%
10	423,868	— 8,113	—1.87%

The largest district (No. 8) has a population of 25,802 in excess of the smallest district (No. 4) with a resulting ratio of largest district to smallest district of 1.06.

Thus, although the 1960 U.S. Census figures were the data which was employed in the consideration of congressional redistricting legislation by the Missouri Legislature, inaccurate calculations caused the Legislature to believe that the populations of the congressional districts in the enacted Bill varied from an ideal district by a lesser number of people than is actually reflected by correct calculations based upon the 1960 census.

The uncontradicted testimony before the court by the legislative leaders from both parties for both Houses was that the legislative deliberations in considering congressional redistricting during the 1967 session had been based upon population.

This testimony also reflected that the Legislature had given consideration to maintaining the integrity of counties throughout the state with the exception of Jackson County, which has a population over 60,000, and with the exception of St. Louis County, which contains over 700,000 people. Consideration was also given to the creation of districts which were compact and contiguous in area as is required by the Missouri Constitution, Article III, Section 45. Further consideration was given to the historical and traditional make-up of congressional districts. In the creation of two of the smallest districts (No. 4 and No. 6) consideration was given to the factor that areas in these districts were growing rapidly in population. In the creation of the largest district (No. 8) consideration was given to a large number of transitory, nonresident and nonvoting people located within the boundaries of the district (Fort Leonard Wood, a large U.S. Military Reservation, the University of Missouri at Columbia and Rolla, and the State Capitol at Jefferson City).

In **Preisler v. Secretary of State**, 257 F.Supp. 952, the court retained jurisdiction for the purpose of the court's future consideration of the constitutionality of any subsequent legislation relating to congressional redistricting that might in the future become the law of Missouri. Upon the 1967 Congressional Redistricting Act becoming law, appellants filed a motion with the court seeking approval of the 1967 Act and seeking termination of the proceedings. After hearings held on the motion and after consideration of briefs filed, the court, by a two to one decision, held that the 1967 Act does not comply with the requirements of Article I, Section 2, Constitution of the United States, and is void. This appeal is taken from that decision.

THE QUESTIONS ARE SUBSTANTIAL.

1.

The majority opinion of the court in the case on appeal finds that the population requirements of Article I, Section 2, of the Constitution have not been met in a congressional redistricting plan if the population variations between the districts are "* * * greater than those that would have been created by better plans in fact presented to but rejected by a legislature or those created by similar plans that may be presented to a court in the trial of an apportionment case. * * *" Appellants contend that the stringent requirements of such a rule are far in excess of the constitutional requirements as construed by this court in **Wesberry v. Sanders**, 376 U.S. 1 (1964). Furthermore, this rule of the lower court is in conflict with the opinions of United States District Courts in other jurisdictions which have been affirmed by this court.

The rule of **Wesberry v. Sanders** is "* * * that as nearly as is practicable, one man's vote in a congressional election is to be worth as much as another's. * * *" The court held that the lines of congressional districts may not be drawn

in such a way as to give some voters a greater voice in choosing a Congressman than others. The court recognized that it may not be possible to draw congressional districts with mathematical precision.

In **Connor v. Johnson**, Civil No. 2830, S.D.Miss., September 28, 1966, not reported, a Congressional Redistricting Act in the State of Mississippi, which created districts with population variations slightly in excess of the population variations in the 1967 Missouri Act, was upheld by the District Court. Upon appeal to this court it was contended, among other things, that this congressional redistricting plan did not conform to constitutional standards of population equality when compared to available alternatives. It was pointed out that a plan had been proposed to the Legislature and to the court in which the population variations were cut in half as compared to the plan adopted without dividing county lines. The lower court was affirmed by this court without opinion on March 27, 1967, in Docket No. 999, 386 U.S. 483.

In **Dinis v. Volpe**, Civil Action No. 66-767-G (not reported), District of Massachusetts, October 3, 1967, the court found that a Congressional Redistricting Act in the State of Massachusetts complied with the requirements of Article I, Section 2, of the Constitution. The court noted that a minority report presented a plan to the legislature which would have reduced the population variations in the districts by almost one-half. Upon appeal to this court the decision of the lower court was affirmed on January 15, 1968, Docket No. 882.

This court has never held that a congressional redistricting act is invalid if other plans which more closely approximate population equality have been presented to the legislature or to the court. The cited cases approved legislative acts under circumstances wherein other plans more closely

approximating population equality had been presented to the legislature and the reviewing courts. These decisions have been affirmed by this court. Therefore, it appears that the opinion of the court on appeal is in conflict with prior decisions of other District Courts as affirmed by this court.

The practical complexities involved in the rule adopted by the lower court can lead to endless mischief. The legislative process of congressional redistricting requires the skillful compromise of a multitude of conflicting individual interests. When a legislature has reached the end of the rope in an apportionment tug-of-war and compromise approximating population equality is being finalized, the entire legislative deliberation can be thrown askew if a plan that is slightly better in the terms of population equality is presented as an eleventh-hour proposal. If a legislature adopted the best congressional redistricting plan in terms of population equality among the districts that had been proposed to it, the governor would be under obligation to veto the plan if a better plan in terms of population equality among the districts was proposed to him before such legislation became law by his signature. Even if no better plan in terms of population equality is suggested to the legislature, an adopted plan is subject to being voided in a subsequent court proceeding in which a slightly better plan may be proposed. Appellants find nothing in the prior decisions of this court or in the prior decisions of any other lower court which suggest that the validity of a congressional redistricting plan may be void if any mathematical improvement in the population of the districts can be demonstrated.

If this court should summarily affirm the opinion, judgment and decree of the lower court the principle adopted by the lower court to the effect that a congressional redistricting plan does not meet the population requirements of the Constitution if plans reflecting districts more equal in pop-

ulation have been proposed, either to the legislature or the court, would become the law of the land. The tremendous impact throughout the several states in the area of congressional redistricting which is inherent in the principle adopted by the lower court indicates the urgent necessity for plenary consideration by this court on review.

2.

The majority opinion of the court in the case on appeal rejects the principle that population variations between congressional districts which are de minimis are constitutionally permissible and the court further finds that minor variations in the population of congressional districts are constitutionally impermissible in the absence of competent and substantial evidence justifying the variations. These stringent principles adopted by the court are in excess of any prior lower court decision or any prior decision of this court. The excessiveness of these principles adopted by the lower court is in conflict, either expressly or impliedly, with **Wesberry v. Sanders**, supra; **Reynolds v. Sims**, 377 U.S. 533 (1964); **Swann v. Adams**, 385 U.S. 440 (1967); **Kilgarlin v. Hill**, 386 U.S. 120 (1967); **Preisler v. Secretary of State of Missouri**, 257 F.Supp. 953, (W.D.Mo. 1966) aff'd. sub nom. **Kirkpatrick v. Preisler**, 385 U.S. 450 (1967; **Connor v. Johnson**, supra; **Dinis v. Volpe**, supra; and a multitude of District Court decisions from jurisdictions all over the United States constituting most if not all of the congressional redistricting cases decided since the decision in this court's landmark case, **Wesberry v. Sanders**.

The ultimate goal in congressional districts is to enable the people of the United States to have an equal voice in choosing the members of the House of Representatives in the United States Congress. A member of Congress is the representative of people and the whole theory of representa-

tive government becomes a mockery if the votes of some people are diluted in favor of overvaluation of the votes of other people. Thus, the issue in any congressional redistricting becomes whether or not the vote of Mr. X has been diluted in a fashion that is repugnant to the fundamental principles of representative government.

Wesberry v. Sanders recognizes that it may not be possible to draw congressional districts with mathematical precision. **Reynolds v. Sims** teaches that mathematical nicety is not a constitutional requisite and that mathematical exactness or precision is hardly a workable constitutional requirement. **Swann v. Adams** declares that de minimis deviations are unavoidable. **Preisler v. Secretary of State** (authored by the same judicial writer who prepared the opinion in the case at Bar) recognizes that the doctrine of de minimis is applicable to population variations between congressional districts (257 F.Supp. l.c. 973). **Kilgarlin v. Hill** rejects the constitutional validity of population variances of the size and significance before the court in that case (14.84% in excess and 11.64% below a mathematically ideal district). **Dinis v. Volpe** finds that the deviations from mathematical perfection in the Massachusetts Congressional Redistricting Act are obviously de minimis. **Connor v. Johnson,** gives implicit recognition to the doctrine of de minimis by finding that the population variations of congressional districts in the Act reviewed by the court (variations in excess of those found in the Missouri Act) reflect districts substantially equal in population. All of the principles cited in this paragraph have been expressly declared by this court or declared by lower court decisions which have been affirmed by this court.

The fundamental principle of the system of representative government in this country requires that the goal in establishing congressional districts is to provide a near equal

voice to each individual in the election of representatives. This ultimate goal cannot be reached but the Constitution requires that the end result of efforts in pursuit of the goal be that one man's vote shall as nearly as is practicable be worth as much as another's. The failure of perfection in pursuit of this goal is evident from the assignment of the number of members of Congress to the several states. Under this complicated process the State of New Hampshire with two members of Congress assigned could elect Congressmen from mathematically ideal districts composed of 303,461 people. At the other end of the pole the State of Maine with two Congressmen assigned could elect members of Congress from mathematically ideal districts composed of 484,633 people. Mathematically ideal districts in the remainder of the states which elect more than one Congressman run the scale between these two extremes. (In passing, it is interesting to note that congressional districts in the State of Maine vary in population by 8.60% and congressional districts in the State of New Hampshire vary by 18.68%). Thus, the fundamental goal of one-man one-vote is impossible of achievement in electing members of Congress throughout the 50 states.

Appellants do not intend to suggest that the variations in hypothetically ideal districts among the several states from 303,461 to 484,633 should permit individual states to establish congressional districts with substantial and significant population variations. Appellants support wholeheartedly the one-man one-vote principle and its application to congressional redistricting plans as a necessary and desirable foundation block in our cherished system of representative government. However, appellants insist that common sense dictates, and the concept of practicable anticipates, a zone of reasonableness in the variation of populations among congressional districts which may be said to meet the require-

ments of Article I, Section 2, of the Constitution, without further explanation. Population variations within this zone of reasonableness are de minimis. The implications toward prolific and widespread litigation in this field for the remainder of the decennium and for the next are staggering should the standards exacted by the divided lower court receive the imprimatur of this court.

It is appellants' observation that most of the several states have faithfully adhered to the application of the one-man one-vote principle in establishing congressional districts subsequent to **Wesberry v. Sanders.** If the rejection of de minimis as a valid principle in determining population variations among congressional districts which are constitutionally permissible becomes the law of the land, practically every one of the several states must commence anew the task to establish valid congressional districts. Appellants earnestly contend that the variations in the 1967 Missouri Congressional Redistricting Act fall within this zone of reasonableness. The far reaching consequences of the opinion and decision of the lower court require plenary consideration by this court on review.

The opinion, decision and judgment appealed from erroneously rejected the authority of **Connor v. Johnson,** Civil No. 3830, S.D.Miss., September 28, 1966, aff'd. 386 U.S. 483 (1967), which was relied upon by appellants in support of the constitutionality of the 1967 Missouri Congressional Redistricting Act.

Appellants relied upon **Connor v. Johnson** as support for the constitutionality of the 1967 Missouri Congressional Redistricting Act. In **Connor v. Johnson** congressional districts which had been established by the Legislature in the State of Mississippi were before the court for a determination as to whether such districts complied with the requirements of

Article I, Section 2, Constitution of the United States. The population variations between the districts were somewhat in excess of the population variations in the 1967 Missouri Congressional Redistricting Act. In Missouri the average ideal district is 431,981, whereas, in Mississippi it is 435,628. In Missouri the largest district has a population of 445,523, this being 13,542 in excess of the ideal or 3.13% in excess. In Mississippi the largest district has a population of 449,565, this being 13,937 in excess of ideal or 3.19%. In Missouri the population of the smallest district is 419,721, this being 12,260 less than ideal or minus 2.83%. In Mississippi the population of the smallest district is 423,300, this being 12,328 below ideal or minus 2.83%. In Missouri the population difference between the largest district and the smallest district is 25,802 or a ratio of 1.06 to 1. In Mississippi the difference in the population between the largest district and the smallest district is 26,265 or a ratio of 1.06 to 1.

The lower court found that the Mississippi Congressional Redistricting Act met the population requirements of the Constitution and an appeal was taken to this court. This court affirmed the lower court without opinion.

The opinion of the lower court in the case at Bar rejected the authority of **Connor v. Johnson** claiming that the issue of population equality was not before this court. It is true that the principal issue raised by appellants before this court in **Connor v. Johnson** was that the Mississippi Act constituted a racial gerrymander among the congressional districts in violation of the Constitution. However, an examination of the Jurisdictional Statement filed by appellants in this court reflects that a failure to achieve population equality in the districts was inherent in the appeal to this court. Population inequality is referred to in the Statement of Facts on page 8 of the Jurisdictional Statement as follows:

"Nor does the legislature's adopted plan conform to standards of population equality when compared to the available alternatives. The difference between the largest and the smallest district under the plan adopted is 28,061; the same figure for the Revised Delta Plan is 13,672, less than half. The greatest deviation from the norm in the adopted plan is 15,332; in the Revised Delta Plan, it is 7,572. The average deviation of all five districts in the adopted plan is 11,547; in the Revised Delta Plan, it is 3,767. Clearly, the desire to achieve mathematical population equality was not decisive for the Mississippi legislature in its choice of plans."

The population inequality issue is further reflected in appellants' argument that the questions are substantial, pages 17 and 18 as follows:

"This Court and other courts have had occasion to discuss the considerations which a legislature may legitimately take into account in reviewing the propriety of districts which deviate from strict population norms. The 1966 congressional districting act of the Mississippi legislature appears on its face substantially to meet the test of numerical equality; the population deviations from the mean of approximately 435,000 do not exceed 3 per cent, which would normally not seem excessive. However, other plans (Appendices D and E, **infra**, pp. 41 and 42) were submitted which 'do demonstrate that a closer approximation to equally populated districts was a feasible undertaking,' **Swann v. Adams**, 35 U.S.L. Week 4101, 4103 (January 10, 1967); in these alternate plans the division of any county was also avoided, and at the same time they preserved the historical pattern of congressional districting in Mississippi much better, and conform more nearly to socio-economic-topographi-

cal patterns in the state. Most important of all, these alternate plans are altogether free of racial gerrymander.

"All the criteria of rational congressional districting could easily have been satisfied by the adoption of any one of several alternative plans. Indeed, it would not have been possible to devise a plan that satisfied all the legitimate criteria to any substantial extent without at the same time creating a congressional district with a substantial majority of Negroes of voting age, which was precisely what the Mississippi legislature was concerned to avoid. They therefore adopted a plan with less equal numerical districts; no explanation was offered for this by the state, and indeed none was available to it other than the frank acknowledgment of the importance of race."

and pages 20 and 21:

"In any event, it is submitted that adequate proof, both of purpose and effect, has been supplied. That something unusual occurred in the drawing of Mississippi's district lines in the present plan can be seen by a look at the First Congressional District in Appendix B, infra, p. 39: We have but to add hind legs and a tail to see a fattened version of Governor Gerry's original salamander. Drawing a line in an east-west direction all the way across the northern half of the state is directly contrary to the scheme of every congressional districting plan used by the state of Mississippi at least since 1894. Population reasons clearly do not demand it; much more equal districts are obtained by dividing all of the counties now in the First and Second Districts in a north-south direction instead of an east-west direction. (Appendix E, infra, p. 42; a north-south division further

would be consistent with all of the detailed evidence introduced as to Mississippi's history, topography, geography, economics, and traditions. Other plans, even more closely following historic precedents in Mississippi, were introduced by appellants in the District Court, and the difference in population between the largest and smallest district in appellants' Revised Delta Plan (Appendix D, **infra**, p. 41) is only 13,672 compared to a difference of 28,061 in the legislature's arbitrary and unusual plan. No evidence whatsoever was introduced by the state to justify the manner in which it acted."

There is absolutely no question but what the principal issue before the lower court in **Connor v. Johnson** was the population requirements of Article I, Section 2, Constitution of the United States. The unreported opinion is set forth in the Jurisdictional Statement filed in that case, pages 27 through 38. The issue as to population equality is discussed and disposed of by the court on pages 33 to 35.

Appellants view this court's summary affirmance of **Connor v. Johnson** to include the opinion and judgment of the lower court to the effect that the congressional districts meet the population requirements of the United States Constitution.

4.

The opinion, decision and judgment appealed from is so fraught with distortion, inaccuracy and irrelevancies that its decision should not stand. These inaccuracies arise continually throughout the opinion and throughout the Findings of Fact. Some of the conclusions are necessarily erroneous being based upon factual inaccuracies. It is difficult to classify or pinpoint these inaccuracies into groups for the purpose of overcoming erroneous conclusions. However, a discussion of certain of these inaccuracies follows for the

purpose of demonstrating the seriousness of such erroneous fact finding. If the court agrees to give plenary consideration to this matter a more complete treatment of the inaccuracies appearing throughout the opinion will be presented by appellants.

1. The opinion of the lower court made the following finding:

> "The evidence adduced at that hearing established that the 1967 General Assembly of Missouri at no time ever considered accurate 1960 census population figures in its consideration of the 1967 Act."

This finding of the court collides with the record which is replete with evidence that the Legislature based all of its considerations on populations obtained from the United States Bureau of the Census with but a single exception. This exception was the use of estimated population for the newly drawn Kansas City wards which the lower court admitted in its opinion were accurate. The court's erroneous finding that accurate population figures were never considered stems from slight miscalculations which apparently resulted from last minute amendments to the enacted Bill. It is difficult to attach any great significance to the miscalculations in view of the extremely small population variations in the enacted Bill. The lower court's obsession with the claimed inaccurate use of census data by the 1967 General Assembly of Missouri and its conclusion that one cannot "hit the bull's eye [one-man; one-vote] with a defectively sighted weapon" (**Sincock v. Duffy**, 215 F.Supp. 169, 194) amounts to dragging a red herring into the case. The significant question was whether or not the 1967 Missouri General Assembly, like William Tell, hit the apple, and it should matter very little whether such was done blindfolded or even through the use of mirrors!

The majority opinion of the lower court assails the competency of the author of Senate Bill 182 by concluding that he used inaccurate population data. Senator Omer Avery, the author of Senate Bill 182, testified as to the population for each of the districts in this Bill. The court makes its own calculations as to the populations of the districts in this Bill and the results of such calculations vary substantially from the calculations testified to by the author of the Bill. The population variations between the districts are far more drastic than the variations contemplated by the author of the Bill. **However, the judicial author of the lower court's opinion did not use the same boundaries for congressional districts as the boundaries used by the author of the Bill.** It has been noted in the statement of the case that there were difficulties inherent in the use of 1960 census data by reason of changes in the wards and precincts in the cities of St. Louis and Kansas City by reason of annexations to the City of Kansas City and by reason of changes in the townships and precincts in St. Louis County which increased the number of townships and precincts. These changes occurred subsequent to the 1960 census. Senator Avery in drafting Senate Bill 182, recognized these difficulties and therefore, described the boundary lines of the congressional districts in St. Louis and St. Louis County with reference to wards and townships as they existed in 1960. Therefore, he calculated the population of the congressional districts in the City of St. Louis and St. Louis County with reference to such boundaries. However, the writer of the majority opinion blandly admitted in a note to the table in which he had calculated the populations of the districts that he was using the boundaries of townships in St. Louis County as they existed in 1967. It is also apparent that the court used ward boundaries in the City of St. Louis which existed in 1967. **It is obvious that the court did not use the same boundaries for congres-**

sional districts which were used by Senator Avery in drafting his Bill. Therefore, the population discrepancies relied upon by the court have no foundation in fact. The court's shaping of the evidence to suit its own purpose should not be condoned.

2. The majority opinion of the lower court finds that "better plans were in fact presented to but rejected by (the 1967) Missouri legislators." This finding by the court is one of the principal foundation blocks upon which it bases its conclusion that the congressional districts in the enacted plan are not as nearly equal in population as practicable. This conclusion by the court is based upon fallacious findings of fact.

The court comments at length upon House Bill No. 870 as being a better plan than the enacted plan. In the words of the court this plan "* * * provided districts that vary substantially less from the ideal than any bill ever before proposed by any Missouri legislature. * * *" In reaching its conclusion the court calculated the population of the various districts proposed by House Bill No. 870. In doing so the court lumped the entire population of the area encompassed by proposed Districts 1, 2, 3, and 9 into one population total. This population total was divided by 4 and equal populations of 431,896 were assigned to these 4 districts. **These district populations bear no relationship what so ever to the populations actually present within these individual 4 districts.** A conclusion that House Bill No. 870 was a better plan from the one-man one-vote concept based upon such a factual premises is entirely fallacious.

Appellants have not calculated the populations of the 4 districts in question. Furthermore, it does not appear that the sponsors of the bill made any attempt to calculate the populations of these districts. The proposed bill utilized

1960 ward and precinct boundaries in the City of St. Louis and 1965 township and precinct boundaries in St. Louis County. Relating 1960 census data to the boundaries described in the proposed bill make it difficult, if not impossible, to compute the population totals of the districts. Any accurate computation of the population of these districts should be made by the experts at the Bureau of Census.

If it is valid to calculate the populations for congressional districts as done by the court for the 4 districts in question, it is equally valid to take the entire geographical area of the State of Missouri with its total population, divide by 10, place 10 abstract stars on a map of the State of Missouri and conclude that 10 perfect congressional districts have been established in so far as population is concerned. **Reductio ad Absurdum!**

3. Appellant's evidence in justification of the somewhat excess population allocated to the Eighth District (the most populated district) was rejected by the court without justification.

The lower court unjustifiably rejected out of hand the defendant's evidence (and not mere argument as the court would suggest) that the 1967 Missouri General Assembly took into consideration the great number of transitory and nonvoting citizens located in the 8th Congressional District of the 1967 Act (i.e., students at the State University, State employees at the State Capitol and members of the U. S. Army at Fort Leonard Wood) in allocating excess population to this district. Voting returns for Pulaski County, wherein Fort Leonard Wood is situated, demonstrate beyond cavil that this county of 46,000 population is but a county of approximately 10,000 from a voting standpoint. A comparison of Pulaski County with all of its adjoining counties in the matter of total vote in relation to the county's population in a recent election amply proves this point.

TOTAL VOTE TO POPULATION—PRESIDENTIAL ELECTION NOV. 1964

County	1960 Population	Total Votes	Percent of Votes
Phelps	25,396	9,531	37.5
Laclede	18,991	8,365	44.0
Texas	17,758	7,836	44.1
Miller	13,800	6,642	48.1
Camden	9,116	5,129	56.2
Maries	7,282	3,246	44.5
PULASKI	46,567	5,239	11.2

Source—Page 1176, Official Manual of Missouri; 1965-66; Pages 27-13, 14, US Census Population; 1960, Number of Inhabitants, Missouri, Final Report PC (1-27A).

The somewhat lower percentage of votes to population in Phelps County reflects the presence of Rolla School of Mines, a branch of the University of Missouri, with approximately 4,000 students.

4. Distortions of testimony by the majority opinion influenced erroneous conclusions.

In appraising the testimony of legislative leaders the court concluded that the standard followed by the Missouri Legislature was "* * * how much variance can we expect to get away with. * * *" In reaching this conclusion the court alluded to the testimony of Senator Avery, the author of Senate Bill 182. The court quotes his testimony to the effect that the "* * * Missouri legislature could comply with the 'as nearly as is practicable' standard of Wesberry v. Sanders by getting within 2% of the equality demanded by Article I, Section 2." When Senator Avery's testimony is viewed in its context, it becomes apparent that the witness, while recognizing that perfect population equality had not been achieved, considered variances of "a little over 2% under" and "approximately 2% over" for the two particular districts about which the witness was testifying to be not unreasonable in the light of other considerations. The other considerations to which the witness was referring were

compactness, as required by the state Constitution, and the integrity of county lines.

The court flatly distorted the testimony of another witness, the Majority Leader of the House of Representatives. The majority opinion described his testimony as an admission that the 1967 Missouri Congressional Redistricting Act could have been greatly improved to the "* * * extent of perhaps lowering the differences between the maximum or minimum by as much as 15,000. * * *" **No such testimony was given by the witness.** The record discloses that the quoted material referred to was included in a question by plaintiffs attorney during cross-examination. **The witness's response did not ratify the statement included in the question.**

The court makes a similar distortion of another witness's testimony by editing the testimony so as to make it appear that the witness believed the 1967 Missouri General Assembly had rejected "* * * a better bill, a stronger bill * * *" in terms of closer equality in population. This witness, the Minority Leader of the House of Representatives, made the statement referred to in quotes in regard to the political composition of the proposed districts in a Bill which had been rejected by the Legislature. It is quite clear that the witness considered the rejected Bill to be "* * * a better bill, a stronger bill * * *" insofar as his political party was concerned rather than insofar as population equality is concerned.

For the reasons indicated herein appellants urge the court in ruling upon the Jurisdictional Statement to read the relatively short testimony, including a deposition of 21 pages and the hearing testimony of 82 pages.

5. Appellants' table comparing maximum population deviations in congressional districts among the several states

was rejected from consideration erroneously by the lower court.

The court unfairly and unjustifiably rejected appellants' table comparing Missouri with other states in the matter of current congressional district statistics. The court apparently discarded these tables because the court believed that the expression of the total percentage deviation from the ideal should be expressed in some other manner than in the mere addition of the highest and lowest percentage figures. The court chose to disregard the only intended purpose of this particular mathematical device, that being only a means of conveniently arranging the various states in a logical sequence. For its intended purpose the method was not inaccurate, and for the court to conclude from this single factor that the entire table was inaccurate, and thus unworthy of any consideration, was improper. The court alluded to a similar table appearing in the Congressional Quarterly weekly report of September 16, 1966 (should be April 15, 1966) at page 814, and summarily dismissed the appellants' table by noting that it did not agree with any of the figures on the aforesaid Congressional Quarterly table. If the court would have closely examined the Congressional Quarterly table, it would have noted that such table did not attempt to list the total variation from highest district to lowest district, as did the appellants' table, but merely listed the "% Maximum Variations" in only a single direction from the ideal.

Appellants are baffled at the court's implication that none of the figures on the table agree with sources cited by appellants. The principal source of the table was the publication by the National Municipal League in August 1967, entitled Apportionment in the 1960's. The information was made current by the other sources cited. In spite of the con-

tempt expressed by the court, appellants firmly stand upon the accuracy of the table.

The court further condemns appellants' table of the several states for the reason that comparisons with other states is totally irrelevant to a determination of the constitutionality of the Act in question. This conclusion of the court conflicts with the opinion in **Dinis v. Volpe**, 264 F.Supp. 425 (1967) l.c. 429, wherein the court stated that deviations from the ideal quotient judicially disapproved in other cases do give some indication of the limits of constitutional departure from numerical equality.

Furthermore, appellants consider the table to be directly relevant to the issue of **de minimis** consistent with the opinion cited above. A comparison of how Missouri stands in relation to the several states in view of the multitude of congressional redistricting plans which have been adopted subsequent to **Wesberry v. Sanders** is relevant to the question of **de minimis.**

The 1967 Missouri Congressional Redistricting Act complies with the requirements of Article 1, Section 2 of the Constitution of the United States. Population was the principal factor considered by the legislature in enacting this law and the minor deviations in the populations of the Districts are well within the standards of de minimis. Therefore the judgment of the lower court in validating the 1967 act is erroneous.

Appellants have demonstrated to the court that the lower court rejected the doctrine that de minimis population variations in the congressional districts are constitutionally permissible per se. It is apparent that this conclusion of the lower court is erroneous and that the doctrine of de minimis applies to the 1967 Missouri Act.

Appellants have compared the Missouri Act with **Connor v. Johnson,** supra, in support of the argument that the population variations are de minimis. Congressional districts approved in the State of Mississippi are somewhat less in the degree of population equality achieved than the Missouri districts under review. Appellants recognize that what is constitutionally permissible in one state may not be constitutionally permissible in another state; **Swann v. Adams,** supra. However, if there is absolutely no difference whatsoever in the facts and circumstances concerning the Congressional Redistricting Act in two states, it must be concluded that population variations which are constitutionally permissible in one state are permissible in the other state. A reading of the decision in **Connor v. Johnson** reflects that the facts, the circumstances, and the considerations, which may be taken into account pursuant to Article I, Section 2, of the Constitution of the United States in establishing congressional districts were identical with the facts, the circumstances, and the considerations in establishing congressional districts in Missouri.

The comparison of congressional districts with the Congressional Districts in Mississippi is supported by **Dinis v. Volpe,** 264 F.Supp. 425 l.c. 429. Certainly consistency in the application of constitutional principles requires comparison if the facts, the circumstances and the considerations which may be taken into account in determining permissible population variations are identical.

The de minimis nature of the districts established by the 1967 Missouri Act is supported by **Gong v. Kirk S.D. Florida,** Civil No. 64-143-CIV-EC, affirmed sub nom. **Kirk v. Gong,** Docket No. 872, January 15, 1968. In the cited case congressional districts were drawn by the lower court. The intended population variation of the largest and smallest district was

1.94%. Following the decision in the case it was discovered that the court had been substantially inaccurate in calculating the population of the districts. The districts, in fact, varied in population by 11.83% between the smallest and largest district. The accurate population figures were calculated by the Bureau of the Census. Upon a motion to reconsider the accurate population data was brought to the attention of the court. The court refused to reconsider and an appeal was taken to this court. This court summarily affirmed on January 15, 1968.

The comparison with the factual situation in Missouri is obvious. In Missouri the legislature thought that they had created districts which varied by 4% between the smallest and largest district. Accurate figures furnished by the Bureau of Census during the course of litigation reflected that the variation was in fact 6%. Affirmance by this court of variations in Florida which were in fact 12% is supported for the de minimis nature of the variations in the Missouri districts which are in fact 6%.

It is respectfully submitted that substantial questions are presented on the merits of the case which merit plenary consideration by this court.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

THE SECRETARY OF STATE OF MISSOURI AND THE ATTORNEY GENERAL OF MISSOURI,

AND

F. V. HEINKEL, R. J. ROSIER, W. W. BECKETT, A. D. SAPPINGTON, L. O. WALLIS, MILLER HERN, HERMAN HETLAGE, HERMAN KERTZ, TURPIN YOUTSEY and GLEN MYERS,
Appellants,

VS.

PAUL W. PREISLER, LOUISE ERBE, BOSTIC J. FRANKLIN, LUCILE RIEDEL, DOROTHY CHILDS, SARAH RIFKIN and MARTHA LEONARD,
Appellees.

ON APPEAL FROM A THREE-JUDGE COURT CONVENED IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

JURISDICTIONAL STATEMENT

PREAMBLE

This is an appeal from the Judgment of a Three-Judge Court convened in the United States District Court for

the Western District of Missouri, Central Division, entered on December 29, 1967, finding that the 1967 Missouri Congressional Redistricting Act is unconstitutional and void. This Statement is submitted to show that the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

OPINION BELOW

The Judgment and Opinion delivered by the lower court are not yet reported. They are rather voluminous and have been printed and filed herein by the other appellants The Secretary of the State of Missouri and The Attorney General of Missouri as appendices to the Jurisdictional Statement of those appellants. Those appendices are as follows:

A. Opinion, Judgment and Decree of Lower Court,

B. Findings of Fact of Lower Court entitled Appendices A through D,

C. Dissenting Opinion of Honorable M. C. Matthes,

D. Comments of Honorable William R. Collinson in clarification of his concurrence,

E. Order of lower court granting conditional stay.

(Also, appendix F is the 1967 Missouri Congressional Redistricting Act.) Prior opinions in this same litigation were referred to by the lower court as, and may be found at *Preisler I*, 238 F. Supp. 187 (W.D. Mo., 1965) and *Preisler II*, 257 F. Supp. 953 (W.D. Mo., 1966).

GROUNDS FOR JURISDICTION OF THIS COURT

This is a congressional redistricting case involving the constitutionality of Missouri's 1967 Congressional Redistricting Act, Sections 128.202 to 128.303, V.A.M.S., 1967. The proceeding was brought pursuant to 28 U.S.C., Sections 1343(3); Article III, Section 2, of the Constitution of the United States; and 42 U.S.C., Sections 1983, 1988 and 2201. The three-Judge Court was convened under 28 U.S.C., Sections 2281 and 2284.

The date of the judgment sought to be reviewed and the date of its entry is December 29, 1967. There was no motion or order with respect to rehearing. The notice of appeal filed by these appellants was filed on January 22, 1968. The notice of appeal filed by appellants Secretary of State and Attorney General was filed on January 12, 1968. Both notices of appeal were filed in the Central Division of the United States District Court for the Western Division of Missouri.

The statutory provision conferring jurisdiction of this appeal on this Court is 28 U.S.C., Section 1253. The case sustaining the jurisdiction is *Wesberry* v. *Sanders*, 374 U.S. 802.

The text of the 1967 Missouri Congressional Redistricting Act is set out verbatim as appendix F in the Appendices to Jurisdictional Statement filed by appellants, Secretary of State and Attorney General. Its official publication will be in Missouri Laws, 1967, which has not yet been published. It may be found in the Pocket Part of 8A Vernon's Annotated Missouri Statutes, page 18, as Sections 128.202 to 128.303.

QUESTIONS PRESENTED

1.

Does the Missouri 1967 Congressional Redistricting Act (Sections 128.202 to 128.303, V.A.M.S., 1967) under which the average variation from ideal is 1.6%, the ratio of the largest to the smallest district is 1.06% to 1, 59% of the total population of the State is required to elect a majority (6 out of 10) of the congressional delegation, the largest variation from ideal was 3.13% above (the district which contains approximately 35,000 soldiers at Fort Leonard Wood, the State Capitol at Jefferson City and approximately 17,000 students at the University of Missouri at Columbia) and the lowest was 2.84% below, one-half of the districts are above ideal and one-half of the districts are below ideal, 7 of the 10 districts are within 1.88% of ideal, violate Article I, § 2 of the United States Constitution as construed in *Wesberry* v. *Sanders*, 376 U.S. 1 (1964)?

2.

In *Connor* v. *Johnson*, No. 3830 decided by a three-judge court in the Southern District of Mississippi on September 28, 1966, and affirmed by the Supreme Court at 386 U.S. 483 (1967), the average variation from the ideal population per district, the disparity ratio and the maximum and minimum variations were greater than those which resulted from Missouri's 1967 Act. That being true, does the judgment appealed from herein result in the application of a double standard by the Federal Judiciary? That is, that which is permissible in Mississippi is not permissible in Missouri?

3.

Does the doctrine of de minimis apply to congressional reapportionment, as suggested by the lower court herein in *Preisler II*, 257 F. Supp. 953 (1966) and, if so, do the population variations resulting from the Missouri 1957 Act violate that doctrine?

4.

Is there a presumption that the Missouri 1967 Act is constitutional and do those asserting unconstitutionality have the burden of demonstrating it?

5.

The undisputed testimony of the officers of the legislature was that the Act, as passed, apportioned the population as nearly equal as is "practicable", from the standpoint of getting an Act passed. There was no evidence to the contrary, although plaintiff-appellees served notice that they would introduce evidence at the hearing they elected not to do so. This being true and the average variation from ideal being only 1.6%, the disparity ratio being only 1.05% to 1, 7 of the 10 districts being within 1.88% of ideal and the maximum variations being 3.13% above and 2.84% below, was it proper for the lower court to declare the Act unconstitutional?

STATEMENT OF THE CASE

Missouri has 10 congressional districts. The population of the State is 4,319,813. Accordingly, an Ideal district would contain 431,981 people.

When the current chapter of this litigation was commenced there was an error in the population of some of the districts. This was discovered at the pre-trial stage.

It was stipulated by all parties that in order to correct this error and to be certain of the number of people actually living in each district under the 1967 Act the Bureau of the Census would be requested to certify as to the number of people living in each of the districts. This was done and that Bureau so certified.

The population figures submitted by the Bureau of the Census under date of October 6, 1967, are as follows:

District No.	Population	Per Centage of Variation from Ideal
One	439,746	+ 1.8
Two	436,448	+ 1.03
Three	436,099	+ .95
Four	419,721	- 2.84
Five	431,178	- .19
Six	422,238	- 2.26
Seven	436,769	+ 1.11
Eight	445,523	+ 3.13
Nine	428,223	- .87
Ten	423,868	- 1.88
Total:	4,319,813	
Ideal population per district:		431,981
Average variation from Ideal:		1.6%
Ratio of largest to smallest district:		1.06 to 1
Per centage of total population required to elect majority of congressional delegation:		59%
Number of districts above Ideal:		5
Number of districts below Ideal:		5

Mean between the average per centage above Ideal and average per centage below Ideal:	0
Number of districts within 1.88% of Ideal:	7
Population difference between largest and smallest districts:	25,802

The Opinion in this case handed down August 5, 1966, *Preisler II*, and reported at 257 F. Supp. 953, involving the 1965 Act was determined upon the following figures and statistics:

District No.	Population	Per Centage of Variation from Ideal
One	474,895	+ 9.94
Two	460,501	+ 6.61
Three	469,886	+ 8.78
Four	402,813	- 6.74
Five	405,780	- 6.06
Six	394,236	- 8.73
Seven	425,820	- 1.42
Eight	443,747	+ 2.73
Nine	451,893	+ 4.62
Ten	389,880	- 9.74
Total:	4,319,451	

Ideal population per district:	431,945
Average variation from Ideal:	6.54%
Ratio of largest to smallest district:	1.218 to 1
Per centage of total population required to elect majority of congressional delegation:	57%

Number of districts above Ideal:	5
Number of districts below Ideal:	5
Mean between the average per centage above Ideal and average per centage below Ideal:	0
Number of districts within 6.74% of Ideal:	6
Population difference between largest and smallest districts:	85,015

The 1961 Redistricting Act declared invalid on January 4, 1965, *Preisler I*, and reported at 238 F. Supp. 187 was determined upon the following figures and statistics:

District No.	Population	Per Centage of Variation from Ideal
One	466,482	+ 7.99
Two	506,854	+ 17.33
Three	480,222	+ 11.17
Four	418,981	- 3.01
Five	378,499	- 12.38
Six	388,486	- 10.07
Seven	436,933	+ 1.15
Eight	452,285	+ 4.7
Nine	409,365	- 5.24
Ten	381,602	- 11.66
Total:	4,319,709	
Ideal population per district:		431,981
Average variation from Ideal:		8.47%
Ratio of largest to smallest district:		1.339 to 1

Per centage of total population required to elect majority of congressional delegation:	56%
Number of districts above Ideal:	5
Number of districts below Ideal:	5
Mean between the average per centage above Ideal and average per centage below Ideal:	0
Number of districts within 10.07% of Ideal:	6
Population difference between largest and smallest districts:	128,355

Obviously, the Missouri legislature has accomplished a great deal since January 4, 1965. Since that date the difference in population between the largest and smallest districts has decreased from 128,355 to 85,015 to 25,802; the number of districts within a certain percentage of an ideal district has gone from 6 within 10.07% to 6 within 6.74% to 7 *within 1.88%*. The disparity ratio between the largest and smallest districts has gone from 1.339 over 1 to 1.218 over 1 to 1.06 over 1 and the average variation from the ideal district has decreased from 8.47% to 6.54% to 1.06%.

THE QUESTIONS ARE SUBSTANTIAL

Prior to the judgment and opinion appealed from herein no court, federal or state, had declared unconstitutional a congressional redistricting act which produced the minimal deviations from Ideal which result from the 1967 Missouri Act. In each of the cases cited in the majority opinion of the lower court the Act declared un-

constitutional resulted in deviations from Ideal much, much greater than those produced by the 1967 Missouri Act. The majority opinion cited no case in which the factual situation resulting from the Act was even close to the situation at Bar. Very conspicuously the majority opinion did not cite nor discuss *Connor* v. *Johnson,* 386 U.S. 483, 18 L. ed. 2d 224 (1967). It was buried in Appendix C where it was said to be inapplicable because of the majority's view of the technical nature of the rules of appellate practice. The dissenting opinion referred to that omission as "the herculean efforts of my brothers to sweep *Connor* v. *Johnson,* 386 U.S. 483 (1967), under the rug."

In that case the 1966 Mississippi Congressional Redistricting Act was attacked. According to the opinion of the lower court (in that case) the Complaint charged that "Each of the Congressional Districts should contain 435,628 persons, to be apportioned on a strict population basis." In footnote No. 1 the court said:

> "While the sole question before the Court was whether House Bill 911 of the Laws of Mississippi of 1966, as far as practicable, apportioned the State into Congressional Districts of equal population in compliance with *Wesberry* v. *Sanders,* there were numerous objections raised by both sides as to the admission of certain items of evidence."

The Court went on to say that:

> "We are of the view that the adjudication of this controversy is controlled by Wesberry v. Sanders,* * *."

It then cited other congressional reapportionment cases, all of which were based upon *Wesberry* v. *Sanders* and Article I, Section 2 of the Constitution of the United States.

On appeal to this court Appellant's Jurisdictional Statement said:

> "Nor does the legislature's adopted plan conform to standards of population equality when compared to the available alternatives. The difference between the largest and the smallest district under the plan adopted is 28,061; the same figure for the Revised Delta Plan is 13,672, less than half. The greatest deviation from the norm in the adopted plan is 15,332; in the Revised Delta Plan, it is 7,572. The average deviation of all five districts in the adopted plan is 11,547; in the Revised Delta Plan, it is 3,767. Clearly, the desire to achieve mathematical population equality was not decisive for the Mississippi legislature in its choice of plans." P. 8, appellants' jurisdictional statement filed in the Supreme Court.

This court affirmed that judgment, *Connor* v. *Johnson*, 386 U.S. 483, 18 L. ed. 2d 224 (1967).

Under the Mississippi Act the population figures and statistics are as follows:

District No.	Population	Per Centage of Variation from Ideal
First	449,361	+ 3.15
Second	427,468	- 1.87
Third	428,447	- 1.65
Fourth	423,300	- 2.82
Fifth	449,565	+ 3.19
Total:	2,178,141	
Ideal population per district:		435,628
Average variation from Ideal:		2.53

Ratio of largest to smallest district:	1.06 to 1
Percentage of total population required to elect majority of congressional delegation:	58%
Number of districts above Ideal:	2
Number of districts below Ideal:	3
Mean between the average percentage above Ideal and average percentage below Ideal:	+ 1.06
Number of districts within 2.82% of Ideal:	3
Population difference between largest and smallest districts:	26,265

It is apparent that the congressmen in Mississippi will be elected in 1968 and 1970 under a redistricting act which produces greater variations from Ideal than does the 1967 Missouri Act. This will be done with the approval of both the three-judge district court *and also this court.* It is respectfully and urgently submitted that if the judgment of the lower court herein is not reversed the federal judiciary will have imposed a double standard of constitutionality. That which is permissible in Mississippi will not be permissible in Missouri. To avoid this the judgment of the lower court should be reversed.

Toombs v. *Fortson,* 241 F. Supp. 65 (N.D. Geo. 1965), was affirmed by this court at 384 U.S. 210, 16 L. ed. 2d 482 (1966). That case is authority for the proposition that a deviation from Ideal of 15% is permissible in a state legislative case. A Fortiori a maximum deviation

of 3.13% with an average deviation of 1.6% is permissible in a congressional redistricting case.

In *Drum* v. *Seawell*, 271 F. Supp. 193 (M.D. N. Car., 1967) the 1967 North Carolina Congressional Redistricting Act was held to be valid. The deviations from ideal resulting from that Act are very close to those resulting from the 1967 Missouri Act. In North Carolina the ratio of the largest to the smallest district is 1.04 to 1, the average variation from ideal is 1.06%, and the greatest variations are from a –1.86% to a +2.31%. The population difference between the largest and the smallest district is 17,276. Although the statistics in North Carolina are a shade better than those in Missouri surely it cannot be said that the difference between constitutionality and unconstitutionality can be sliced so thin.

In the case at bar the dissenting opinion of Circuit Judge M. C. Matthes is a scholarly and deadly-accurate statement of the applicable law. It recognizes that redistricting is a *legislative* function. Also, Judge Matthes' excellent opinion correctly analyzes the majority opinion as holding, in effect, and as a reality, that every apportionment act must be cast aside if the reviewing court can devise a scheme for more equal representation. That is exactly and precisely the result of the majority opinion.

It is respectfully submitted that the questions presented, including, but not limited to, the question of the application of a double standard of constitutionality by the federal judiciary, are so substantial as to require plenary

consideration with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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*Footnotes—to Appendices A and B, printed in separate accompanying document entitled Footnotes to Appendices A and B of Jurisdictional Statement.

APPENDIX A

Opinion, Judgment and Decree of Lower Court

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI,

CENTRAL DIVISION

PAUL W. PREISLER, et al.,
Plaintiffs,

vs.

THE SECRETARY OF STATE OF MISSOURI and THE ATTORNEY GENERAL OF MISSOURI,
Defendants,

F. V. HEINKEL, et al.,
Intervenor-Defendants.

No. 1064

Before M. C. MATTHES, Circuit Judge, JOHN W. OLIVER, and WILLIAM R. COLLINSON, District Judges.

JOHN W. OLIVER, District Judge, joined by WILLIAM R. COLLINSON, District Judge.

I.

This case presents for judicial review the third effort made by a Missouri General Assembly since the 1960 decennial census to divide this State into ten congressional districts of as nearly equal population as is practicable, in conformity with the dual mandates of Article 3, Section 45 of the 1945 Missouri Constitution and of Art. I, §2 of the Constitution of the United States. Application of principles established by Art. I, §2 of the Constitution, as construed by the Supreme Court of the United States, requires that we hold that this third effort does not pass constitutional muster.

The initial decision of this Court, rendered January 4, 1965, determined that the 1961 Missouri Congressional Redistricting Act was unconstitutional but deferred granting

any judicial relief "until the Legislature of the State of Missouri has once more had an opportunity to deal with the problem;" this Court refused to presume that "the Legislature of the State of Missouri will refuse to take all necessary action to comply with its duty under the Federal, as well as its own State, Constitution." **Preisler v. Secretary of State of Missouri**, 238 F.Supp. 187, 191 (W.D. Mo. 1965) (**Preisler I**).

Following **Preisler I** the Seventy-third General Assembly of Missouri enacted the 1965 Congressional Redistricting Act, Mo. Stat. Ann. Title 9, §§128.202-.305 (1965). That Act was subjected to judicial scrutiny and held to be constitutionally void on the ground that it also failed to comply with the command of Art. I, §2 of the Constitution. **Preisler v. Secretary of State of Missouri**, 257 F.Supp. 953 (W.D. Mo. 1966) (**Preisler II**). Our decree in the second case, however, for reasons fully stated in light of **Swann v. Adams II**, 383 U.S. 210 (1966), permitted the 1966 Congressional elections to be conducted under the constitutionally void 1965 Act. We retained jurisdiction for the purpose of reviewing any new Congressional redistricting plan enacted by a future General Assembly and signed by the Governor. 257 F.Supp. at 982. On January 9, 1967 the judgment of this Court was affirmed by the Supreme Court of the United States. **Kirkpatrick v. Preisler**, 385 U.S. 450 (1967).

In 1967 the Seventy-fourth General Assembly of Missouri again tackled the problem. Its effort culminated in legislation which became effective on October 13, 1967, hereinafter referred to as the 1967 Act, Mo. Stat. Ann. Title 9, §§128.202-.305 (1967). This case pends on the Attorney General of Missouri's motion for approval of the 1967 Act and for dismissal of this case.

Plaintiffs contend that the 1967 Act is unconstitutional because the populations of the districts were not "as equal

as is practicable," since the variances between district populations are substantial. The 1967 Act is not challenged on any ground other than failure to comply with Art. I, §2 of the federal Constitution. The parties who intervened in **Preisler II** and urged approval of the 1965 Act have appeared and participated in the same role in regard to the 1967 Act.

Defendants attached to their pending motion a map of the State of Missouri which illustrated the boundaries of the districts and purported to show the actual population of each district. Defendants' motion alleged that "all of the population figures referred to [on that exhibit] are based on the United States Census for 1960." Plaintiffs' responsive pleading suggested that the population data presented by defendants in their motion did not accurately reflect the 1960 census population data. Procedures were therefore adopted at a pre-hearing conference under which accurate figures were promptly obtained from the Bureau of Census.

The following table illustrates the differences between the population data presented by Appendix B attached to defendants' motion and that established by the accurate 1960 census figures:

Comparison of Population Figures Represented As Accurate in Defendants' Appendix B With Actual 1960 Census Figures in Evidence

District	Population Represented Def. App. B	Variance Represented Def. App. B	Actual Census Population	Actual Census Variation
1	436,417	+ 4,436	439,746	+ 7,765
2	442,302	+ 10,321	436,448	+ 4,467
3	431,507	— 474	436,099	+ 4,118
4	428,815	— 8,166	419,721	— 12,260
5	430,412	— 1,569	431,178	— 803
6	425,238	— 6,743	422,238	— 9,743
7	436,769	+ 4,788	436,769	+ 4,788
8	439,984	+ 8,003	445,523	+ 13,542
9	428,223	— 3,758	428,223	— 3,758
10	423,866	— 8,115	423,868	— 8,113

It is apparent that defendants' Appendix B accurately reflected the actual population of only two of the ten districts (Districts 7 and 9). The variations in regard to two other districts (Districts 5 and 10) are obviously minor.[1]

Before the facts concerning the actual population variances were established, defendants' sole legal contention that the 1967 Act be approved was based on the notion that "the districts resulting from the 1967 Congressional Redistricting Act comply with the doctrine of de minimis in regard to population variances between the districts." After defendants learned that the actual population variances established by the 1967 Act were in many instances substantially greater than those set forth in defendants' pending motion, they advised the Court that defendants would like to adduce evidence to attempt to justify the greater variations that had in fact been established.[1a] Defendants and intervenors continue to contend that, in any event, the variances actually established, even though greater than those that the 1967 Missouri Legislature believed it was creating, nevertheless should still be ruled to be de minimis.

Defendants' motion was set for hearing before the full panel of this Court as requested by defendants. This evidence adduced at that hearing established that the 1967 General Assembly of Missouri at no time ever considered accurate 1960 federal census population figures in its consideration of the 1967 Act. That evidence further established that the accurate 1960 census figures for all appropriate 1967 political subdivisions were in fact furnished the experienced chairman of the Missouri Senate Reapportionment Committee (the same Senator served in the same capacity in regard to both the void 1961 and 1965 Acts) for his consideration and use. The inaccurate population figures presented by defendants' pending motion were in fact the inaccurate population figures used by both the Missouri Senate and House

in connection with its legislative action that produced the 1967 Act.[2] Chief Judge Biggs' statement in **Sincock v. Duffy**, D. Dela. 1963, 215 F.Supp. 169 at 194, is apposite. In considering a proposed apportionment plan for Delaware it was found as a fact that "census enumeration districts were included when they should have been excluded, or excluded when they should have been included." After noting that "to the extent they were erroneously included, the population for the proposed district is over-stated," Chief Judge Biggs said:

> The erroneous exclusion or inclusion of enumeration districts in representative districts throws population figures askew. When one vote-one person is the aim, it is impossible to hit the bull's eye with a defectively sighted weapon.

The difficulties of attempting to reapportion the State of Missouri with inaccurate population figures is made vividly apparent by a comparison of the variances created by the unidentified population figures actually used by the chairman of the Senate Reapportionment Committee when he prepared the original of the bill eventually enacted, Senate Bill No. 182, (see pages 27-28 of the Chairman of the Senate Reapportionment Committee's deposition), with the variances in fact produced by that original bill under the 1960 federal census figures. The following table makes that comparison:

Senate Bill No. 182
As Originally Introduced
by the Chairman of the
Senate Reapportionment Committee

District	Figures Used by S.B. 182 Author	Apparent Variance	Actual Census Population	Actual Census Variance
1	423,712	— 8,269	408,950	— 23,031
2	444,462	+ 12,481	460,469[1]	+ 28,488
3	448,824	+ 16,843	462,716	+ 30,735
4	428,113	— 3,868	428,224	— 3,757
5	430,412	— 1,569	434,459	+ 2,478
6	427,710	— 4,271	427,710	— 4,271
7	428,173	— 3,808	423,103	— 8,878
8	426,260	— 5,721	429,928	— 2,053
9	427,313	— 4,668	412,249[1]	— 19,732
10	432,281	+ 300	431,966	— 15
	4,217,260		4,318,774	
			+ 39[2]	
			4,318,813	

1. These figures represent the actual population of the respective districts as outlined in the Bill, adding the 1960 figures for the new Townships of Spanish Lake (formerly in Florissant) to the 9th District and of Ferguson to the 2nd District.

2. The actual census figures for wards in St. Louis City as per Stipulated Exhibit No. 18 are 39 less than the total population. The Bureau of the Census has explained that this discrepancy "results from a number of technical factors in the processing of the data." (Stipulated Exhibit No. 18).

The author of Senate Bill No. 182 twice testified that he was still under the impression the Missouri Legislature could comply with the "as nearly as is practicable" standard of **Wesberry v. Sanders** by getting within 2% of the equality demanded by Art. I, §2 (Deposition, pp. 13-14, 18).

Defendants' evidence, consisting of the testimony of the party leaders in both houses of the 1967 Legislature, and the Chairman of the Senate Reapportionment Committee, was simply that many bills were introduced; that the one finally adopted had a stormy passage and was amended many times; and that finally it barely passed the House. Defendants contend that these facts demonstrate that this was the best bill, in respect to practicably equal population, that could be passed; and, therefore, attempt to argue that the division of population provided is, in fact, as "nearly equal

as it practicable.'"[3] In other words, defendants would have this Court hold that their definition of "practicable" is legally equivalent to "acceptable to a majority of the legislature." We reject that argument.

We find that defendants' evidence leads to the inevitable conclusion that a majority of the members of the Legislature were motivated by other considerations than the constitutional objective of "practicable equality." Our specific factual findings in regard to the 1967 Act and in regard to the rejection of better plans by the 1967 Missouri Legislature are fully stated in Appendix A attached and made a part of this opinion by this reference. The legislative history and changes made by the 1967 Act in prior acts held to be constitutionally void are also there stated in detail, together with the facts concerning how the shifts of particular political subdivisions from one 1967 Act district to an adjoining district would have made both districts more nearly equal in population.

It is not necessary to restate the constitutional principles applied in **Preisler II**. That case was affirmed by the Supreme Court on January 9, 1967 and is the law of this case. The same day **Preisler II** was affirmed, the Supreme Court in **Duddleston v. Grills**, 385 U.S. 455 (1967), vacated the judgment rendered in **Grills v. Branigin**, S.D. Ind. 1966, 255 F.Supp. 155, and remanded that case to the three-judge Indiana court for further consideration in light of **Swann v. Adams**, 385 U.S. 440 (1967), **Wesberry v. Sanders**, 376 U.S. 1 (1964), and **Reynolds v. Sims**, 377 U.S. 533 (1964).[4]

Swann v. Adams, 385 U.S. 440 (1967), also decided January 9, 1967, although a state reapportionment case, nevertheless established burden of proof principles applicable to all reapportionment cases. Mr. Justice Harlan stated in his dissent, joined by Mr. Justice Stewart, that the burden of

proof rule there established "stand[s] on its head the usual rule governing . . . the validity of legislative enactments, state as well as federal, which is, of course, that they come to us with a strong presumption of regularity and constitutionality" (supra, at 447). Mr. Justice Harlan's strongly held conviction that "the burden of showing unconstitutionality should be left here, as in other cases, on the attacking party" was, of course, explicitly rejected by the majority of the Supreme Court.[5]

In **Kilgarlin v. Hill**, 386 U.S. 120, decided February 20, 1967, Mr. Justice Harlan and Mr. Justice Stewart dissenting, the Supreme Court reversed a Texas three-judge court for the reason that:

> Under that case [**Swann v. Adams III**], it is quite clear that unless satisfactorily justified by the court or by the evidence of record, population variances of the size and significance evident here are sufficient to invalidate an apportionment plan. Without such justification, appellants' analysis of H.B. 195 made out a sufficient case under the Fourteenth Amendment. (supra, at 122).

The basic contentions made by defendants in this case were accepted by the Texas three-judge court only to be rejected by the Supreme Court.

The impact of **Swann v. Adams III** and **Kilgarlin v. Hill** was immediate and consistent. All three-judge federal courts and state courts deciding congressional apportionment cases, with the benefit of either or both of those cases, have been able, with one exception, unanimously to determine every such case that has been decided this year. See **Dinus v. Volpe**, D. Mass. 1967, 264 F.Supp. 425;[5a] **Wells v. Rockefeller**, S.D. N.Y. 1967, No. 66-Civ., (decided May 10, 1967, and not yet reported;[5b] **Baker v. Ellington**, N.D. Tenn. 1967, Civ. No. 3945 (decided July 7, 1967 and not yet reported);

Gong v. Kirk, S.D. Fla. 1967, No. 64-143 Civ. E.C., (decided August 2, 1967 and not yet reported; pending on appeal); **Silver v. Reagan, Governor**, Cal. 1967, No. Sac. 7814 and 7815, (decided October 6, 1967 and not yet reported); and **Exon v. Tiemann, Governor**, D. Nebr. No. Civil 1628 L, (decided November 22, 1967 and not yet reported). The only split decision was that in **Lucas v. Rhodes**, N.D. Ohio 1967 (decided May 10, 1967, not yet reported). That case was reversed by the Supreme Court on December 4, 1967. (See 36 Law Week 3225). The notion expressed in the majority opinion in the reversed Ohio case to the effect that "an element of 'practicality' is implicit in the concept of 'practicability' as that term is to be applied in a districting case" was implicitly rejected by the Supreme Court when it reversed that case in its one sentence per curiam opinion which cited only **Wesberry v. Sanders.**

The principle is firmly settled that the proponents of a redistricting plan must sustain the burden of justifying **any** deviation from practicable equality of population. **Swann v. Adams**, supra, at 445; **Reynolds v. Sims**, supra, at 577-80; **Maryland Citizens Committee for Fair Cong. Redistr. v. Tawes**, 253 F.Supp. 731, 733 (D. Md. 1966), aff'd sub nom. **Alton v. Tawes**, 384, U.S. 315 (1966). This Court must also follow and apply **Kilgarlin v. Hill's** express requirement that before a particular plan may be approved as constitutional the District Court must be able, from the evidence adduced by the defendant, to articulate legally acceptable reasons for the specific variations in population between districts that have been shown to exceed the "as nearly as is practicable" standard of Art. I, §2.

Both **Swann v. Adams III** and **Kilgarlin v. Hill** teach that courts can not refuse to adjudicate bona fide controversies concerning alleged abridgements of the constitutional right to an equal vote. The infrequent judicial use of the phrase

"de minimis" in apportionment decisions cannot properly be converted into a generalized rationalization of variances that are shown, on the precise facts presented in a particular case, to have been both avoidable and greater than those variances that would have been produced by a more faithful application of Art. I, §2's standard of "as nearly equal as is practicable."

Defendants' basic de minimis argument is not tenable. The phrase "de minimis" was first used in an apportionment case in **Baker v. Carr**, 369 U.S. 186 (1962). Mr. Justice Harlan there suggested that the variances in the 1901 Tennessee state apportionment were only "de minimis" from an apportionment formula established by the Tennessee Constitution. 369 U.S. at 335-336. Mr. Justice Clark countered by stating that Mr. Justice Harlan's efforts to justify those variances on "such generalities as 'classic legislative judgment,' 'no significant discrepancy,' and 'de minimis' departures [are shown by] even a casual glance at the apportionment . . . to be entirely fanciful" (369 U.S. at 258).

Only three lower federal courts have made reference to "de minimis." **Calkins v. Hare**, E.D. Mich. 1964, 228 F.Supp. 824, used the phrase in explaining and emphasizing why the "mathematical precision" caveat in **Wesberry v. Sanders** could not be used as "an escape hatch for the reluctant." (Id. at 829). This Court, in **Preisler II**, made similar explanatory use of the "de minimis" doctrine." We stated that "use of such words as 'feasible' and 'practicable' in a careful statement of the fundamental constitutional principle constitutes but a recognition that the familiar doctrine of de minimis is applicable and is designed to make clear that a State legislature would not be expected to create entirely new political subdivision lines in order to have absolute and precise mathematical equality in its congressional districts" (257 F.Supp. at 973).

The third lower federal court case to mention "**de minimis,**" however, attempted to give that phrase a definitive and fixed conceptual meaning. That case was **Kilgarlin v. Hill**, S.D. Tex. 252 F.Supp. 404. The majority opinion in that case attempted to create a burden of proof formula under which (1) "**de minimis**" variations were to be placed at one pole and considered to be constitutionally permissible, (2) "**per se**" variations were to be placed at the opposite pole and held to be constitutionally void, and (3) all cases in the middle area of the mathematical scale would be held to be constitutionally permissible unless the plaintiff was able to "negate the existence of any state of facts which would sustain the constitutionality of the legislation" (252 F.Supp. at 414).

That case was reversed by the Supreme Court. In reversing, the Supreme Court simply held that the burden of proof rule established by **Swann v. Adams III**, which had not been decided when the Texas three-judge court attempted to establish a different burden of proof rule, was controlling. The Supreme Court did not deem it necessary even to discuss the elaborate lower court formula that included "**de minimis**" as a conceptual part of its involved legal theory of percentage and ratio justification. In fact, the only other mention of the **de minimis** phrase by the Supreme Court, other than that noted in the concurring and dissenting opinions in **Baker v. Carr**, was in **Swann v. Adams III**, supra at 444. Mr. Justice White's use of "**de minimis**" was in precisely the same pattern as the explanatory use made of that phrase by **Calkins v. Hare**, and **Preisler II**. He simply stated that "mathematical exactness or precision is not required" because "**de minimis** deviations are unavoidable" (385 U.S. at 445). The lower federal court reversed by **Swann v. Adams III** had not even mentioned the words "**de minimis**" in its opinion. It is therefore obvious that no

question concerning the phrase was presented to or placed in focus for Supreme Court determination by the appeal from that lower court decision.

We believe that the Supreme Court's reversal in **Kilgarlin v. Hill** is at least an implicit rejection of any notion that the judicial use accorded the phrase "**de minimis**" can be converted into either an exception to the burden of proof rule so recently established by the Supreme Court in apportionment cases or as an independent defense that may, without proof, be said to justify variances greater than those that would have been created by better plans in fact presented to but rejected by a legislature or those created by similar plans that may be presented to a court in the trial of an apportionment case. We know of no court, state or federal, with the sole exception of the reversed Texas three-judge court, that has ever expressed a contrary idea concerning the very place that the "**de minimis**" phrase occupies in the constitutional law applicable to apportionments. "**De minimis,**" we suggest, belongs where Mr. Justice Clark put it in his concurring opinion in **Baker v. Carr**; among discarded generalities such as "classic legislative judgment" and "no significant discrepancy."

So long as counsel representing State legislatures attempt to get courts to convert the infrequent judicial use of the phrase "**de minimis**" into some sort of numerical formulae under which ratios or percentage deviations fixed in one case become the rule in another for purposes of an attempted measurement of "how much variance can we expect to get away with," the whole thrust of the Supreme Court's apportionment cases is misconceived. Indeed, the whole thrust of many earlier Supreme Court cases, decided before the apportionment cases were decided, is ignored.

Gray v. Sanders, 372 U.S. 368 at 379-380, held long before

either **Reynolds v. Sims** and **Wesberry v. Sanders** were on the books, that "the concept of 'We the People' under the Constitution visualizes . . . equality" and that "the idea that every voter is equal to every other voter in his State . . . underlies many of our decisions."

All the Supreme Court's apportionment cases from **Baker v. Carr**, 369 U.S. 186 (1962) to the present time teach that a particular apportionment case must be held to present a bona fide justiciable controversy and that a congressional apportionment plan cannot be approved by a lower court as constitutional unless the variances above those which result mathematically from the application of the "as nearly as is practicable" standard did in fact result from and are justified by the application of a legally acceptable principle of rational State policy. The burden of proof to so establish rests upon the defendant.

When it becomes apparent, therefore, from the facts presented in a particular case, that the apportioning body could have districted the particular state in a substantially more nearly equal manner, without doing violence to any articulated legally acceptable state policy, consideration of **de minimis** is at an end in that particular case.[8]

Kilgarlin v. Hill based its reversal on the dual ground that the lower court had not applied the proper burden of proof rule and upon its failure to "articulate any satisfactory grounds for rejecting at least two other plans presented to the court, which respected county lines but which produced substantially smaller deviations" (supra, at 124).

The undisputed and unexplained facts of this case show (a) that the 74th Missouri General Assembly did not in its 1967 Act in fact provide districts which "as nearly as is practicable one man's vote for a congressional election is . . . worth as much as another's;" (b) that the 1967 Missouri

Legislature in fact rejected plans that came much closer to so doing; and (c) that any number of shifts of political subdivisions including counties, to say nothing of townships, wards and precincts, would have produced a congressional districting plan that would have been in closer compliance with the constitutional command of Art. I, §2.

In **Preisler II** we took detailed notice of more practicable plans that had been proposed to and rejected by the 1965 Missouri General Assembly. The 1967 74th General Assembly enacted a bill that malapportioned this State in a manner more extreme than the plan proposed to the 1965 Legislature as Senate Committee Substitute for Senate Bill No. 302, to which this Court devoted detailed attention in **Preisler II**. Table IV on page 964 of 257 F.Supp. reflects a comparison of the changes proposed by that rejected 1965 plan with those finally enacted by the 1965 Legislature. The 1967 Legislature's action in enacting its 1967 Act was taken in the face of the express caveat stated in **Preisler II** that our discussion of the better plan rejected by the 1965 Legislature was not to be construed by a future Missouri General Assembly as an approval of the rejected plan but only to show that the 1965 Act did not in fact comply with the constitutional standard.

The fact that the 1965 Legislature could have adopted a more practicable plan with districts more nearly equal in population had it not rejected Senate Committee Substitute for Senate Bill No. 302 was demonstrated by our discussion in **Preisler II**. The fact that the 1967 Legislature could have done the same thing demonstrates that its 1967 Act was not a plan that represented the most faithful application of the "as nearly equal as is practicable" standard. The rejected 1965 plan obviously would have produced variances that departed less from the ideal than those created by the 1967 Act. Our discussion of the rejected 1965 plan is not to be

taken by a future Missouri Legislature as any intimation that such rejected plan, if adopted, would pass constitutional muster. Determination of that question would turn upon the sufficiency of the evidence adduced by defendants to justify and explain the quite obvious and substantial variances contained in that plan.

The 1967 Missouri Legislature rejected a better plan than that presented to the 1965 session of the Legislature. House Bill No. 870, proposed to and rejected by the 1967 Missouri General Assembly, provided districts that varied substantially less from the ideal than any bill ever before proposed to any Missouri Legislature. It is also apparent that particular districts containing populations much closer to the ideal than those eventually created by the 1967 Act were proposed by earlier versions of Senate Bill No. 182, as that bill progressed toward final passage, and by still other bills, all of which were rejected by the 1967 Missouri Legislature.

Our detailed findings concerning House Bill No. 870 and the other better plans rejected by the 1967 Legislature that demonstrate how Missouri could have been divided into ten districts of more practicably equal population than those provided in the 1967 Act are made in Appendix B which is incorporated in this opinion by this reference. We find that the variances produced by those better plans are in fact substantially less than those created by the 1967 Act. Our discussion of those better plans is solely for the purpose of demonstrating that the 1967 Act was not in fact the most practicable plan that could have been enacted. We intimate no judgment on the question of whether House Bill No. 870 or any of the other plans discussed would or would not pass constitutional muster for the reasons that have been sufficiently stated.

The prime difficulty with all three of the past reappor-

tionment efforts of the respective Missouri Legislatures in the years 1961, 1965, and 1967 has been that the task has not been approached with an understanding that, since **Wesberry v. Sanders**, no State legislature in the United States can unnecessarily abridge one's right to an equal vote in a congressional election any more than it may constitutionally deny one his right to trial by jury, his right of free speech, his right to freedom of religion, his right of peaceful assemblage, or any one of his many other rights guaranteed by the Constitution of the United States. Indeed, the discharge of this delicate and quite fundamental constitutional duty has been treated by three successive Missouri legislatures as a legislative step-child; apparently qualification for appointment to the committees which have unsucessfully attempted to do the actual work seems to have been limited to those who insist upon believing that something less than full performance of the dual mandates of the Missouri and federal Constitutions is all that is required.

It was explicitly held in **Wesberry v. Sanders** that "Our Constitution leaves no room for classification of people in a way that unnecessarily abridges" their right to an equal vote in a congressional election (376 U.S. at 17).

Legislation implementing the command of Art. I, §2 must divide the population into districts in which "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's" (376 U.S. at 7-8). Those who have been responsible for the drafting of Missouri's three congressional redistricting plans have adamantly refused to recognize that these constitutional principles are as binding on all State legislatures of the United States as upon all State and federal courts.

The facts established in the three cases decided by this Court demonstrate that in all three legislative efforts the

leadership of both political parties in the Senate and the House were given nothing better to work with than a makeshift bill produced by what has been candidly recognized to be no more than that deemed to be an expedient political compromise. And even that was not furnished until the closing hours of the session when nothing could have been done to either discover or correct even obvious errors.

This Court repeats for the third time that the Constitution does not leave room for intentional 85%, 95%, or even 98% compliance with its mandate; that Art. I, §2 commands equality of population in congressional districts "as nearly as is practicable;" and that any enacted plan that fails to comply with that constitutional standard, unless otherwise justified by substantial evidence in accordance with applicable law, is constitutionally void.

This Court obviously has no alternative other than to deny defendants' pending motion for the reasons that (1) we must find that the 1967 Act does not in fact divide the population of Missouri into districts as nearly equal as is practicable; and (2) because the obviously avoidable population variances in the 1967 Act can not be satisfactorily justified on any legally acceptable ground supported by any evidence in this record. It is therefore totally impossible for this Court, on the basis of any substantial evidence, to relate any "declared justification to any specific inequalities among the districts" or to "articulate any satisfactory grounds for rejecting . . . other plans presented [both] to the court [and to the 74th General Assembly of Missouri] which would have produced substantially smaller deviations" than those created by the 1967 Act. **Kilgarlin v. Hill**, supra, at page 124. Defendants have simply failed to carry the burden of proof imposed on them by **Swann v. Adams III**, a case decided before Senate Bill No. 182 was introduced in the 1967 Missouri Legislature. We so find and determine.

Defendants' pending motion should be and will therefore be denied. Because of the public interest involved in this, as in all State and congressional apportionment cases, we have attached as Appendix C our discussion of all the contentions presented by either the defendants or by the intervenors that have not been explicitly answered in the body of this opinion.

II.

There remains the question of remedy. Significant developments have occurred since **Preisler II** was decided that could in the near future require that our order of August 5, 1966 be appropriately modified. That order, consistent with the applicable congressional statute then in effect required that Missouri's congressional delegation be elected at large.

In **Preisler II** we directed specific attention to the fact that a "failure of the Missouri General Assembly to properly redistrict after the 1930 census forced the election of Missouri's entire congressional delegation to be held at large in 1932" (257 F.Supp. at 955).[9] We also noted that Missouri had been fully advised "over thirty years ago that a Missouri General Assembly's failure to reapportion congressional districts in accordance with law required that 'unless and until new districts are created, all Representatives allocated to the state must be elected by the state at large" (257 F.Supp. at 981), quoting from **Smiley v. Holm**, 285 U.S. 355 at 374-5 (1932). **Carroll v. Becker, Secretary of State**, 285 U.S. 380, which compelled Missouri's 1932 congressional elections at large, was decided on the authority of **Smiley v. Holm** and made application of the congressional statute in effect at that time and still in effect at the time **Preisler II** was decided.

Our order of August 5, 1966 was made, as stated in **Preisler II**, pursuant to the Congressional "command of Section

2 a(c) of Title 2, United States Code, enacted pursuant to Art. I, §4 of the Constitution of the United States" (257 F.Supp. at 981). That section of the United States Code was enacted as a part of the Act of June 18, 1929 (46 Stat. 26). As we also noted in **Preisler II, Wood v. Bloom**, 287 U.S. 1 (1932), held that Congress had failed to reenact any legislation requiring the election of Representatives from districts when it refused to include the provisions of the Act of August 8, 1911 (37 Stat. 14) in its Act of June 18, 1929.

Indeed, the latter Act, inconsistent with legislation that had required Representatives to be elected from districts since the Act of 1842 (5 Stat. 491), expressly provided that in the event a State failed to properly redistrict after a **decrease** in the number of Representatives apportioned to that State, the Representatives of such State "shall be elected from the State at large" (Section 2 a(c)(5), of Title 2, United States Code).

Section 2 a(c) did not require an election at large in the event a State failed to reapportion in cases in which the State either **gained** or **stayed the same** in the number of Representatives apportioned to it after a decennial census. It was for this reason that federal three-judge courts in Maryland and Tennessee, for examples, were not prevented by congressional mandate from redistricting those particular states by court order.

The Supreme Court's reversal of the Indiana three-judge court in **Grills**, and the affirmance of **Preisler II** last January, of course, focused Congressional attention on the fact that the Act of June 18, 1929 was indeed a Congressional command to the federal three-judge court in Indiana and to this Court to order elections-at-large in the event the Legislatures of Indiana and Missouri should fail to pass a constitutional redistricting act in time for the 1968 elections. The order of this Court, of course, expressly so provides.

Recent Congressional developments reveal that long standing efforts to re-enact the 1842 requirement for district elections in the present Congress seemed doomed to the same failure suffered by similar efforts in every Congress over at least the past fifteen years.[10] But, most recently, the 1842 requirement was successfully attached as a rider to a private immigration bill for the relief of one Dr. Ricardo Vallejo Samala (H.R. 2275, 90th Cong. 1st Sess.). The rider, in the precise language of the Act of June, 1842, provides that "there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative . . .". That private bill, with its attached rider, passed the House on November 28, 1967, passed the Senate on November 30, 1967, and became law on December 14, 1967 when it was signed by the President. See Congressional Record: November 28, 1967 H15901 and November 30, 1967, S17458.

When that legislation became law, this Court was relieved of the prior existing Congressional command to order that the 1968 and succeeding congressional elections in Missouri be held at large. This Court, therefore, will be free, in the event no constitutional plan is enacted at the coming Special Session of the Missouri Legislature, to direct appropriate proceedings that will enable it to make an appropriate redistricting order. In the event it should become necessary for this Court to exercise that power we shall follow procedures similar to those that were followed by other three-judge federal courts that have drawn congressional districts for particular states.

Judge Matthes, in his concurring opinion in **Preisler II**, stated that:

> We have emphasized that the responsibility for enacting a constitutionally permissible redistricting plan rests on the Legislature of Missouri. Although the task may be fraught with difficulties, certainly it is not an impossible one. We are convinced that a conscientious effort, motivated by a desire to satisfy the requirements of the federal and State constitutions, will result in the formulation of congressional districts which will comport with the demands of the Constitution of the United States and the Constitution of Missouri (supra, at 982).

That statement continues to reflect the view of this Court. We would be hopeful that all appropriate steps will be taken by all responsible persons to the end that a constitutionally valid redistricting plan be presented to this Court in order that it not be required to take further action in this case. Should it become apparent that further action is necessary, we shall, as we must, and on our own motion, direct further appropriate proceedings in this case.

For the reasons stated, we find and determine that the 1967 Missouri Congressional Reapportionment Act presented by defendants' pending motion does not pass constitutional muster. It is therefore

ORDERED that defendants' pending motion should be and is hereby denied. It is further

ORDERED that the judgment and decree of this Court entered August 5, 1966 should be and are hereby ordered to remain in full force and effect, subject, however, to future appropriate modification. It is further

ORDERED that any filings for the House of Representatives of the United States Congress that may have already been made under and pursuant to the 1967 Missouri Congressional Reapportionment Act should be and are hereby declared to be null and void, that no further filings be accepted under that Act, and that any and all future action

that may be taken in connection with any filings that may have been made should be and will be considered a violation of the order of this Court. It is further

ORDERED that pursuant to Rule 56(c) of the Rules of Civil Procedure, this opinion and the appendices attached thereto shall serve as our findings of fact and conclusions of law. It is further

ORDERED that jurisdiction of this cause be retained for the purposes that have been stated.

John W. Oliver
District Judge

Wm. R. Collinson
District Judge

Dated this 29th day of December, 1967.

Findings of Fact of Lower Court

(Entitled Appendices A through D)

APPENDIX A

Factual Findings in Regard to 1967 Act and Rejection of More Practicable Districts, Including Practicability of Shifts of Political Subdivisions

We follow the pattern of **Preisler II** in making our specific findings of fact in regard to the 1967 Act. Appendix A attached to **Preisler II** at page 983 of 257 F.Supp. illustrated the changes made by the 1965 Legislature in the 1961 Act held void in **Preisler I**. The undisputed facts in **Preisler III** establish that the changes made by the 1967 Legislature in the 1965 Act held void in **Preisler II** follow precisely the same pattern followed by the 1965 Legislature in its modification of the 1961 Act.

Change "A" on **Preisler II's** Appendix A showed that Mercer County (pop. 5,750) was shifted by the 1965 Act from District 9 to District 6. The 1967 Act added to that same shift the counties of Grundy (pop. 12,220); Putnam (pop. 6,999) and Sullivan (pop. 8,783) with a total population of 28,002.

The 1967 shift of additional rural population from District 9 to District 6 in the 1967 Act commanded still further invasion of the urban population in the St. Louis metropolitan area in exactly the same pattern of invasion established by the 1965 Act.

While the overvaluation of District 6 was reduced to −9,743 by the 1967 Act, it is perfectly obvious that had Schuyler County (pop. 5,052) been added to the 1967 shift from the District 9, the variance of District 6 would have

been reduced to a variance of —4,691. The inclusion of Schuyler County in the 1967 shift was in fact proposed to the 74th General Assembly in Senate Bill No. 182 as that bill was originally introduced; remained there in the Senate Substitute for Senate Bill No. 182, and was removed from the perfected Senate Committee Substitute for Senate Bill No. 182 only when the shift of Adair and Macon Counties was proposed. Had the plan proposed in the Senate Committee Substitute for Senate Bill No. 182 been adopted District 6 would have had a variance of only + 268.[11]

Change "B" illustrated in **Preisler II's** Appendix A stated that the 1965 Act shifted several Kansas City wards from District 4 to District 5. The 1967 Act's shuffle of Kansas City wards, quite by accident, brought the variance of District 5 to within—803 of an ideal district of 431,981. Such a variance, if it could be separately considered, would apparently be within constitutional range. But congressional apportionment plans can not be viewed piecemeal; they must be viewed as a whole. The 1967 shifting of Kansas City ward population of 25,398 to District 5 required that additional population be added to District 4 which was already 29,168 deficient before the shift. Accordingly, more populous Saline County (pop. 25,148) was shifted from District 8 and St. Clair (pop. 8,421) and Benton (8,737) Counties were shifted from the deficient District 7—a total addition of only 42,306. The 1967 shift resulted in a reduction of the minus variance in the 1967 Act's District 4 to —12,260.

But, once again, it is perfectly obvious that had Howard County (pop. 10,859) been included in the shifts made by the 1967 Act the variation of District 4 would have been further reduced to —1,401. The inclusion of Howard County in District 4 was specifically proposed to the 1967 General Assembly along with Saline and other counties in Senate Bill No. 182 as that bill was originally introduced. Had that

plan not been rejected and had proper, unquestionably practicable, allocation been made concerning the wards of Kansas City, both Districts 4 and 5 would have had variances of only —639 and —640, respectively.

Change "C" on **Preisler II's** Appendix A illustrated the 1965 Act's shuffle of several St. Louis wards and St. Louis County townships . . . among the First, Sectond, Third, and Ninth Districts." The same sort of shuffle was made in the 1967 Act; only more so. Under the 1967 Act St. Louis County was fragmented into five, rather than four separate congressional districts. The reason why further invasion and fragmentation of the population of the St. Louis metropolitan area was necessary is obvious.

In order to improve the 1965 Act's treatment of District 4, the 1967 Act shifted population formerly in District 8. Similar depletion of District 8's 1965 allocation of population was rendered necessary in order to bring the rural District 10's 1967 allocation of population closer to the ideal. The architect of the 1967 Act frankly stated that the attempt of the 1967 Legislature to use the population allocated to District 8 under the 1965 Act to bolster the deficient population of adjoining districts under the 1967 Act was "just like squeezing a sponge" so far as District 8 was concerned (Dep. p. 13).

Although he did not know it at the time, the author of Senate Bill No. 182 actually had more water in District 8 than he thought he had. Because he used population figures from a still unidentified source, the Chairman of the Senate Committee was under the erroneous impression that District 8 was being allocated only 8,003 excess population under the 1967 Act. The 1960 census figures establish that an excess of 13,542 population was actually placed in District 8 by the 1967 Act. It is therefore apparent that it was neither practicable nor even necessary for the 1967 Act to have extended

the boundaries of District 8 to the city limits of St. Louis. But even if the invasion of the St. Louis metropolitan population could be justified, which is impossible on the facts presented, it is obvious that a shift of Howard County (pop. 10,859) from overpopulated District 8 to either of the adjoining and underpopulated Districts 4 or 6 would have most substantially reduced the variations of those transferor and transferee districts.

In further specific regard to the 1967 Act's shuffle of St. Louis wards and St. Louis County townships we find that the 1967 Missouri General Assembly, like the 1961 and 1965 Missouri General Assemblies, attempted to disregard and ignore basic population data that will not go away. The 1960 census figures make it obvious that the City of St. Louis with its 1960 population of 750,026 needed to have added only 113,936 additional population to entitle that total population to two ideal congressional districts. It cannot be validly argued that it was not practicable for the 1967 Legislature to have created two districts with extremely small variations without violating the integrity of political subdivisions as large as townships, to say nothing of violating ward lines as practiced in the 1967 Act. For example, and only for example, the addition of the populations of the townships of St. Ferdinand (pop. 66,420), Hadley, (pop. 24,720), and Lincoln (pop. 22,380) in St. Louis County to the population of the City of St. Louis would have provided sufficient population for two congressional districts, each of which would have varied only −208 from the ideal. The drawing of the line to divide that 864,378 population into two congressional districts as nearly equal as practicable was in fact an extremely easy task because the 74th General Assembly established no policy that prevented its use of existing precinct lines, at least in the metropolitan geographical areas of Missouri for use in dividing the two districts.

Urban precincts, generally regulated as they are by the number and capacity of voting machines assigned them, necessarily have relatively small populations. The ability to shift precincts from one side of a district dividing line to the other makes it entirely practicable to get exceedingly close to equal populations for adjoining districts as was demonstrated in the Jackson and Clay County apportionments to which attention was directed in **Preisler II** (257 F.Supp. at 978, footnote 16). The Kansas City Star for December 5, 1967 reports that the new boundary lines for the Kansas City School Board divided the population within that school district "into six subdistricts each with about 71,500 population." Local government public officials in this judicial district have consistently demonstrated that the one man—one vote constitutional principle can be applied without difficulty given the desire so to do.

The particular St. Louis townships mentioned have been used solely for illustrative purposes. That use, however, supports our factual finding that it was in fact entirely practicable for the 1967 Legislature to have created two compact and contiguous congressional districts in the St. Louis metropolitan area in accordance with the command of the Missouri Constitution that would have in fact avoided all except exceedingly small variations for two of the congressional districts to which that population was by law entitled.

We make the same finding in regard to how a third congressional district could have been formed from the 1960 population situated in the remaining portion of St. Louis County. Such a third congressional district could not have included all of the remaining townships in the only charter county in the State that would have been left unassigned in the example just stated in regard to how two practicable St. Louis metropolitan congressional districts could have been created; the most northerly townships of St. Louis

County would necessarily have to have been assigned to still a fourth congressional district, some of which would have included a part of "outstate" Missouri.

The practicable third district that could have been made to adjoin the area described for the first two practicable districts, with full observance given an assumed established policy against cutting township lines outside of metropolitan cities, would have included the following townships of St. Louis County:

Table Showing How a Third Practicable District Could Have Been Created Using St. Louis County 1960 Population

St. Louis County Township of:	1960 Population
Lemay	40,095
Concord	36,273
Gravois	52,205
Jefferson	35,649
Clayton	51,092
Creve Coeur	48,681
Midland	50,417
Washington	19,304
Normandy	37,673
Bon Homme	53,779
Meramac	9,528
Total Population	434,696
Ideal District	431,981
Variance	+2,715

Whether the plus variance of 2,715 indicated in the above table would, on the facts, be "as nearly equal as is practicable" would, of course, be entirely dependent upon the proof adduced in any case in which such variance might be challenged. As Chief Justice Weintraub noted in **Jones v. Falcey**, 222 A.2d at 108, one of the valid teachings of **Meeks v. Avery**, 251 F.Supp. at 151, is that "where a pattern is disclosed in which the integrity of political subdivisions is ignored, then the districts could be formed with population substantially equal in each of them; and when . . . lines [are]

completely disregarded in . . . many instances the court [is] justified in holding that a pattern had developed in which the integrity of political subdivisions was ignored."

That sound principle merely says that a State legislature must practice what it preaches. A State legislature should therefore anticipate that a purported State policy of observing particular political subdivisions lines can not be relied upon to justify variances above those which would have been created by proper application of the "as nearly as is practicable" principle unless the legislature's enacted plan does in fact observe and apply such an articulated State policy.

The evidence in this case establishes that the township lines of St. Louis County were in fact broken by the 1967 Act; precinct lines were in fact used to define the boundaries of particular congressional districts created by the 1967 Act. It is therefore not necessary to apply the principle of **Jones v. Falcey**, supra, to the factual situation presented in **Preisler III**, because the avoidable variance created by the 1967 Act's Districts 1, 2, and 3 of + 7,765, + 4,467, and + 4,118, respectively, are far above the variances that would have been created had the 1967 Legislature in fact established and followed the less stringent policy of recognizing townships and ward lines.

Change "D" in Appendix A to **Preisler II** illustrated how the 1965 Legislature changed the allocation of population made in its 1961 Act to District 7. We there noted that the 1965 Missouri Legislature had shifted only Barton County (pop. 11,113) from District 7 to District 4. As noted above, the 1967 shuffle of Kansas City's wards made it necessary to shift St. Clair and Benton Counties from District 7 to District 4. Defendants' hearing Exhibit A, the map used by the majority leader of the House, shows that those particular counties, along with other counties involved in other shifts

made by the 1967 Act apparently were the subject of some sort of special discussion because those counties were shaded with a lead pencil.

The problem created by the shift of St. Clair and Benton Counties required that the 1967 Legislature shift additional population into District 7. Once again the population allocated to District 8 under the 1965 Act had to be "squeezed like a sponge." Camden (pop. 9,116) and Laclede (pop. 18,991) Counties (both of which were pencil shaded on the House majority leader's map) were shifted from old District 8 with a resultant total net gain of 10,949 population for District 7. That shift produced a + 4,788 variance under the 1967 Act.

But this Court must face the undisputable fact that the addition of Hickory County (pop. 4,516) to the 1967 shift from old District 7 to new District 4, would have reduced new District 7's variance to a + 278 and would have, at the same time, reduced the variance of new District 4 from a −12,260 to a −7,754.

Hickory County was in fact proposed for inclusion in District 7 in several versions of Senate Bill No. 182 as that bill progressed through the 1967 Missouri Legislature. Indeed, the Senate Substitute for Senate Bill No. 182 made provision for a District 7 that included Hickory County in which the variation from the ideal district was −1,292, a substantially smaller variation than that eventually created by the 1967 Act.

Change "E" noted in **Preisler II's** Appendix A reflected the 1965 Act's shift of Wayne County from the 1961 Act's District 8 to that Act's District 10. Following the same pattern established in 1965, the 1967 Legislature shifted the additional and quite sparsely populated counties of Shannon (pop. 7,087), Carter (pop. 3,973), Reynolds (pop. 5,161), Iron

(pop. 8,041), and Madison (pop. 9,366) to form the 1967 Act's District 10. The 1967 Act's additional shift reduced the greatest minus variation of the 1965 Act only to a minus variation of 8,113. The undisputable facts establish that had Dent County (pop. 10,445) been added to the 1967 shift, the variance of new District 10 would have been reduced to + 2,332. That shift would have also had the effect of reducing the variance in adjoining new District 8 to + 3,105. We further find that House Committee Substitute for Senate Committee Substitute for Senate Bill No. 182 was proposed to and rejected by the 1967 Missouri General Assembly. That plan proposed the inclusion of Dent County in the 1967 shift (together with every other one of the other five counties that were in fact shifted by the 1967 Act). Acceptance of that proposed and rejected plan would have produced a variance of + 1,064 for new District 10.

The 1967 Missouri Legislature was required to put the squeeze on old District 8 to provide new District 10 the population assigned it by the 1967 Act. The 1967 Act's shift of additional rural counties from old District 8 to new District 10 was compensated for by siphoning still more population from the St. Louis metropolitan area. The 1967 Legislature invaded St. Louis County population by extending the boundaries of still a fifth congressional district to include part of that County. The 1967 Act added Concord and Meramac townships and particular precincts in Bon Homme in St. Louis County to new District 8.

The addition of that portion of St. Louis County by the 1967 Act caused new District 8 to stretch from the city limits of St. Louis to within less than 75 miles of the city limits of Kansas City. Thus, in total disregard of the duty to draw compact and contiguous districts placed on it by the Missouri Constitution, the 74th General Assembly added the population of urban St. Louis County to an essentially

rural district in order to balance out the population of the five rural counties shifted from old District 8 to new District 10 by the 1967 Act. For the applicable Missouri law on gerrymander, see **State ex rel. Barrett v. Hitchcock**, Mo. 1912, 146 S.W. 40,[12] and **Preisler v. Doherty**, Mo.Sup.Ct. en banc 1955, 284 S.W.2d 427. Compare **Gomillion v. Lightfoot**, 364 U.S. 339 (1960), for circumstances under which gerrymandering can become a federal question.

In **Preisler II** we found as a fact that "the discrimination against the St. Louis metropolitan area, evidenced by the 1961 Act, was continued under the 1965 Act" (257 F.Supp. at 958, fn. 4). We find that the 1967 Act continues the same discrimination. We found in **Preisler II** that under both the 1961 Act and the 1965 Act "the city of Kansas City was split between three separate Congressional districts," and that under both acts the "population of Kansas City . . . continued to be utilized to increase the deficient population of two essentially rural districts" (257 F.Supp. at 960). We make the same finding in regard to the use of Kansas City's Platte and Clay County population in regard to District 6 created by the 1967 Act. In **Preisler II** we found that the 1961 Act and the 1965 Act "both have the same pattern of overvaluation and overweight of the votes in the rural geographical areas, as contrasted with the votes in the two metropolitan areas of the State" (257 F.Supp. at 960). We make the same finding in regard to the 1967 Act, particularly as it applies to the St. Louis metropolitan area and the area of Kansas City north of the Missouri River.

In **Preisler II** we found and held that "all that the Seventy-third General Assembly did [in its 1965 Act] in regard to the 1961 Act held constitutionally impermissible in **Preisler I** was to move three small counties from one district to another and to shift a few wards from one district to another in both metropolitan areas" (257 F.Supp. at 980).

We find and hold in **Preisler III** that all the 74th General Assembly did in regard to the 1965 Act held constitutionally void in **Preisler II** was to add a few more counties to the shifts of rural counties and to invade more grossly than ever before the population concentrated in the two metropolitan areas of this State.

In **Preisler II** we found that the overvaluation of votes in the particular districts created by the 1965 Act had been established by "the undisputed and unexplained facts" presented in that case. We noted in **Preisler II** that "counsel did not attempt to suggest any reason why it was not practicable to avoid variances . . ." (257 F.Supp. at 969). We expressly rejected the argument presented by counsel for the intervenors that the 1965 Act represented "the best that could be gotten under the practical political circumstances" (257 F.Supp. at 969).

We emphasized again and again that the "substantial population deviations and variances" were "unexplained" (257 F.Supp. at 974). We directed attention to what we called the most significant language in **Drum I** in regard to what we believed to be the burden of proof in apportionment cases. We italicized the language of Judge Sobeloff in **Tawes I** from page 976 of 257 F.Supp. that anticipated the Supreme Court's later holding in **Kilgarlin v. Hill**. On page 977 of 257 F.Supp. of **Preisler II**, we italicized the precise language from **Tawes III** that the Supreme Court quoted as the proper burden of proof rule in **Swann v. Adams III**. And, finally, we expressly rejected in **Preisler II** defendants' arguments that attempted to establish considerations of "political stability" and their arguments concerning "political," "economic," "historical," and "traditional" factors as legitimate grounds upon which disparities from population based districts could be justified (257 F.Supp. at 980).

The legal principles that underlie those findings are, of course, the law of this case as affirmed by the Supreme Court.

APPENDIX B

(in Two Parts)

I. Discussion of House Bill No. 870

Our specific findings in regard to House Bill No. 870 proposed to and rejected by the 1967 Missouri Legislature can best be understood by preliminary examination of the following table:

House Bill No. 870 as Originally Introduced and Rejected by the 1967 Missouri General Assembly

H. B. 870 District No.	1967 Act District No.	1960 Census Population	1960 Population Variance
1	(1)	431,896[1]	— 85[1]
2	(2)	431,896[1]	— 85[1]
3	(3)	431,896[1]	— 85[1]
4	(5)	430,361	— 1,620[2]
5	(6)	435,066	+ 3,085[2]
6	(9)	431,418	— 563
7	(7)	427,972	— 4,009[2]
8	(8)	428,678	— 3,303[2]
9	(9)	431,897[1]	— 84[1]
10	(10)	438,733	+ 6,752[2]
		4,319,813	

1. The total population for Districts 1, 2, 3 and 9 is distributed evenly in this table because St. Louis County Townships were split into precincts and accurate census data for those precincts is not in evidence. However, it is obviously practicable to divide the area involved into almost equal populations because the division involves the shifting of precincts of relatively small populations.

2. The variances produced in the adjoining 4th and 5th Districts and those produced in the adjoining 7th, 8th, and 10th Districts could be further substantially reduced by shifts of townships or precincts from one adjoining district to another. Such shifts are entirely "practicable" under a state policy that seeks to maintain the integrity of a political subdivision line no larger than a precinct. The above variances are calculated on an assumed policy that county lines are to be recognized in outstate Missouri. There is some evidence that there is such a policy in Missouri, a matter not necessary for our determination in this case.

Every district proposed in House Bill No. 870 was more nearly equal to the ideal population than that enacted in the 1967 Act excepting only District 5. Proper application of the constitutional principles of practicability, with use of Kan-

sas City precinct lines as the dividing line, would have permitted the division of the 1,465 excess population for the two congressional districts defined as District 5 and 6 in House Bill No. 870 (roughly comparable to Districts 4 and 5 in the 1967 Act) to be divided almost equally between those two proposed districts. Thus, from a theoretical viewpoint, 733 population could have been assigned to one district and 734 to the other. It is therefore apparent that even the −803 variance that accidentally resulted for District 5 in the 1967 Act could have been improved.

Defendants' failure to obtain and to introduce in evidence the 1960 census data for 1967 precincts in St. Louis and St. Louis County does not relieve this Court of its duty of making the finding of fact that the total population assigned Districts 1, 2 and 3 and 9 is only 341 in excess of that required for four ideal congressional districts and that such population could have been practicably divided almost equally among those districts for the reason, as in the case of Kansas City, use of precinct lines for the boundaries of each of those districts, and application of the constitutionally required principle of practicability, would have permitted the shift of precincts from one side of a congressional boundary line to the other until, in the language of the command of **Wesberry v. Sanders**, "as nearly as is practicable, one man's vote in a congressional election [would in fact] be worth as much as another's."

Defendants' and intervenors' expressed hostility to computers and electronic brains is totally misplaced. The task of drawing congressional boundary lines as nearly as is practicable to divide the total population allocated to the four districts proposed by rejected House Bill No. 870, or for all ten districts in Missouri, does not require the use of a computer or an electronic brain. It did and does require one to have and to use accurate population figures, the

ability to add and subtract, and, most important, a willingness and desire to comply with the explicit commands of the Constitutions of his State and Nation. Any finding that a better plan could not have been adopted would necessarily be held clearly erroneous because such a finding would be contrary to the undisputed evidence concerning rejected House Bill No. 870.

The witnesses called by defendants testified that "there probably were changes that could be made . . . by the shift of a county here [or there that] would greatly improve this as to the extent of perhaps lowering the difference between the maximum and minimum by as much as 15,000" (Tr. 36); that "there isn't a man in this room that couldn't divide the state on the 1960 population and come up with compact, contiguous districts that come within close equal population" (Tr. 58); and that the 1967 Legislature had in fact rejected "a better bill, a stronger bill" (Tr. 64). Even the three-time Chairman of the Senate Reapportionment Committee testified that "it's mighty easy to . . . divide his state, and either one of us could do it very much better than his [the 1967 Act] is done" (Dep. 14).

And when **Preisler II** was argued, the Assistant Attorney General of Missouri stated to his Court in regard to the 1965 Act that "if you were looking at population as being the sole factor, the only factor that could be considered, . . . I would have to immediately confess . . . that you would probably have to get within one percent variation in order to say that you have met the population factor, if that is your sole factor" (first quoted 257 F.Supp. at 968).

It is quite apparent from all the evidence that all real work on the 1967 Act, is exactly the pattern followed in regard to the 1965 Act, was left to the always hectic closing days of the session. The elected leadership of both parties in the

Senate and the House were not consulted until long after it was, as a practical matter, too late for them to correct the mistakes of the committees into whose hands control of the delicate problem of reapportionment had been placed. Compare the description of the similar action of the North Dakota legislature in **Paulson v. Meier**, N.D. 1965, 246 F. 36 at 42. Attention to that case was directed by the Supreme Court in **Swann v. Adams**, 385 U.S. 440 at 446.

The factual pattern of the 1965 Legislature was repeated in the 1967 session of the Missouri Legislature when Senator Young filed constitutional objections to the 1967 Act in the Senate, on June 28, 1967. His constitutional objection stated that "the congressional districts created . . . do not meet the requirements of the Missouri Constitution that such districts be 'as nearly equal in population as may be,' Art. III, Section 45." This Court's decision in **Preisler II** was cited and portions of that opinion quoted.

On July 13, 1967 Representatives Meyer (27th), Mulvaney, Schlef and Walsh, filed a constitutional objection in the House. Their objection followed substantially the same form as Senator Young's except that the House objection again reflected the fact that all members of the 74th General Assembly labored under the erroneous impression that the variance between "the high congressional district and the low" was "more than 16,000," instead of 25,802, as was discovered only after defendants' pending motion was filed.

The undisputed facts show that the actual variance between the high district, District 8, **and every other district**, excepting only District 5, actually exceeds the erroneously assumed maximum variance figure of only 16,000 against which the constitutional protests were filed in both the Senate and House. One cannot help but speculate what would have happened had the members of the 74th General As-

sembly, at the time, been accurately advised in regard to the extent of the variances actually created by their 1967 Act.

II. Additional Data Showing That the 1967 Act Did Not In Fact Divide Missouri's Population Into Most Practicably Equal Districts.

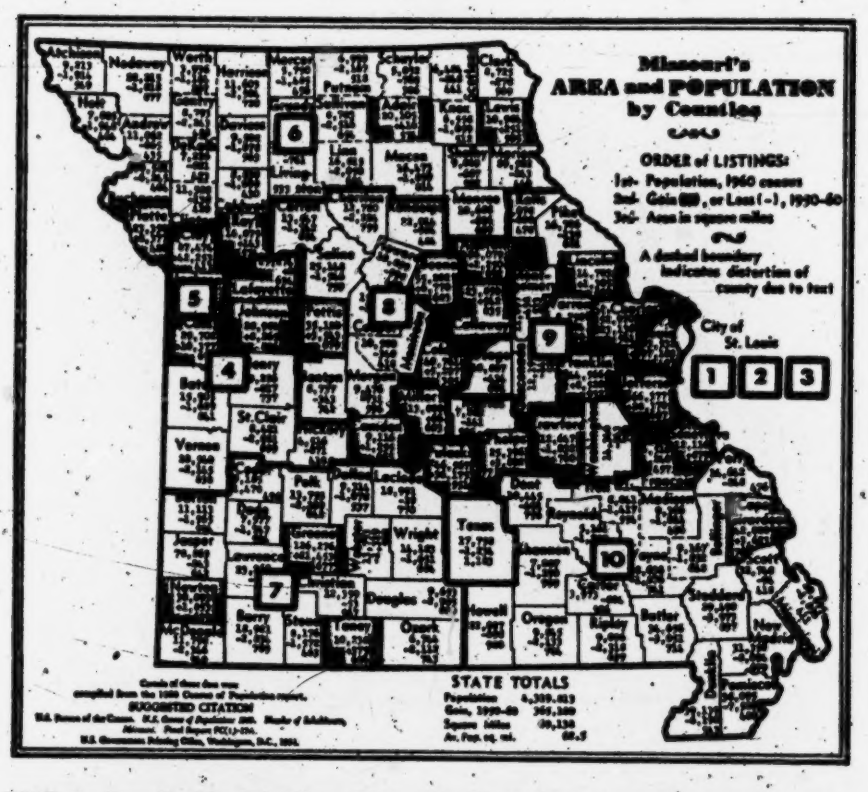
Map 1 illustrates the point in the text that a Missouri Legislature could have created districts that are more nearly equal in population as is practicable than the 1967 Act and still permit every present incumbent to run from his present residence.

Map 2 illustrates how acceptance of particular districts proposed in various bills presented to the 1967 74th General Assembly, had they been combined, would have produced variances of less than 2,000 population for each district in the State, a more practicable plan than that adopted in the 1967 Act.

Map 3 illustrates more practicably equal districts that would have squeezed all the water out of old District 8 to the end that the urban and rural populations of this State would have been more realistically distributed.

We again emphasize that the publication of these maps is not a recommendation for the Missouri Legislature to adopt any plan illustrated. The data is stated to establish the fact that the 1967 Act did not establish districts that were in fact the most nearly equal in population that was practicable.

MAP 1



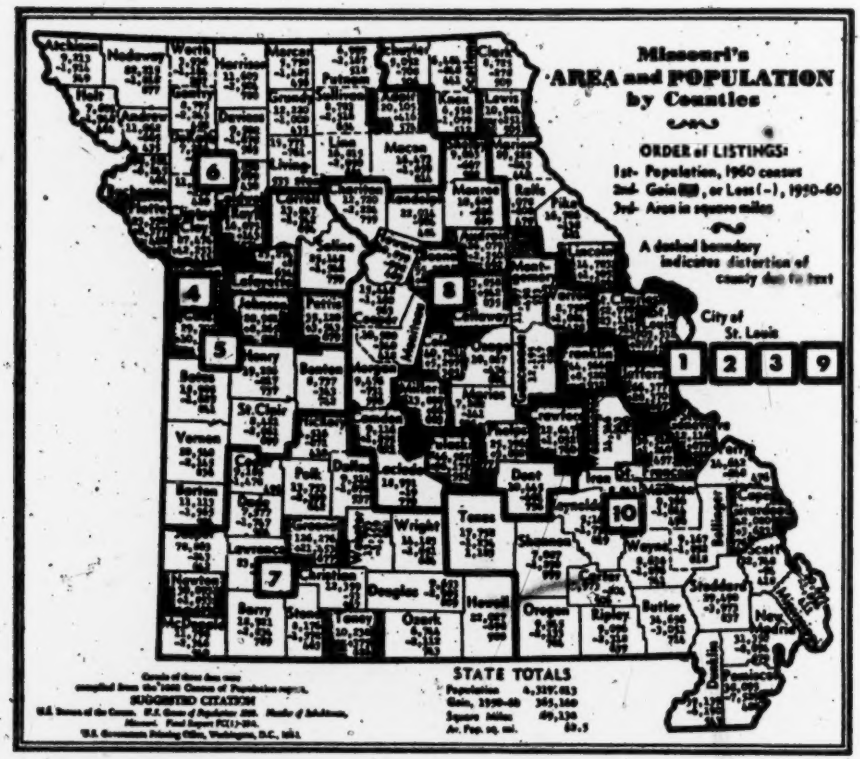
MAP 1—Practicable Districts That Would Not Disturb Incumbent Congressional Representatives

District	Population	Variance
1	431,735	— 246
2	431,735	— 246
3	431,735	— 246
4	431,386	— 595
5	431,385	— 596
6	431,851	— 130
7	434,250	+ 2,269*
8	429,688	+ 2,293*
9	431,735	— 246
10	434,313	+ 2,332**
	4,319,813	

* Transfer of particular townships in Dallas or Laclede Counties from 7th District to 8th District would bring both districts within a variation of only 12 population for both districts

** Transfer of particular townships in either Ste. Genevieve, St. Francois, Iron or Dent Counties from the 10th District to the metropolitan St. Louis Districts (1 2, 3, or 9) would reduce variation in the 10th District to 734.

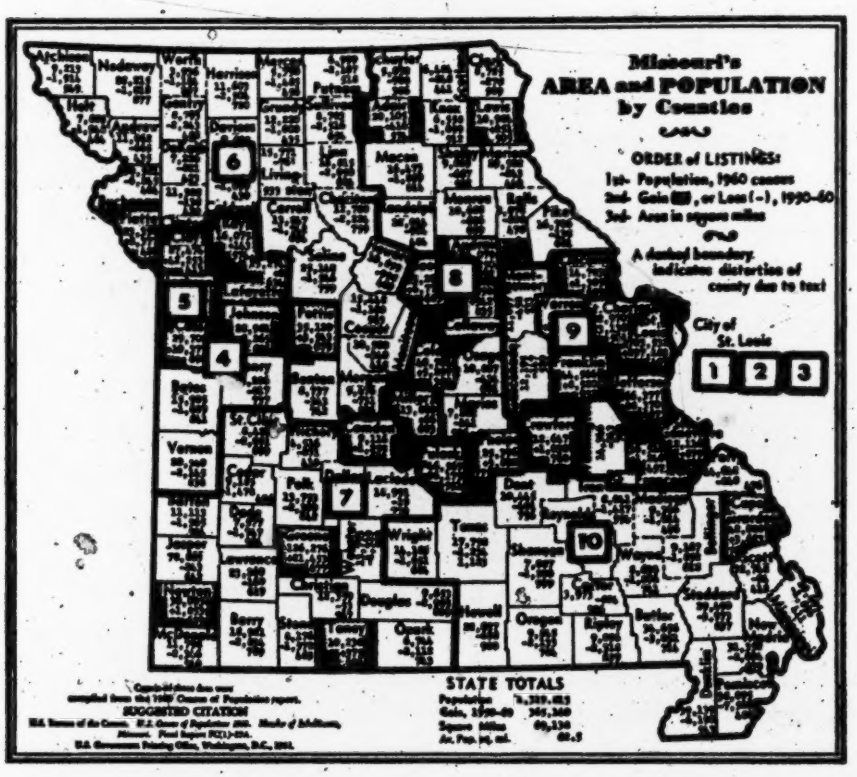
MAP 2



MAP 2—Composite Map from Various Redistricting Plans Rejected by Missouri General Assembly

District	Population	Variance	Source
1	431,091	— 890	Simple addition
2	431,091	— 890	" "
3	431,091	— 890	" "
4	432,373	+ 392	1967 H.B. 399 minus Cedar & Hickory plus Carroll
5	432,373	+ 392	
6	432,249	+ 268	1967 Perf. S.C.S. for S.B. 182
7	430,689	— 1,292	1967 S.B. 182 (Sen. Sub.)
8	433,821	+ 1,840	Simple addition
9	431,090	— 891	" "
10	433,945	+ 1,964	1965 S.C.S. for S.B. 302 1965 G.A. minus Howell plus Texas

Map 3



MAP 3—Practicable Districts That Would More Realistically Distribute Urban and Rural Populations

District	Population	Variance
1	431,819	— 162
2	431,819	— 162
3	431,818	— 163
4	432,954	+ 973
5	432,955	+ 974
6	433,977	+ 1,996
7	433,004	+ 1,023
8	429,380	— 2,601
9	431,818	— 163
10	430,269	— 1,712

APPENDIX C

(In Four Parts)

Discussion and Rejection of Additional Contentions Made By Defendants and Intervenors

In addition to the contentions made in support of the 1967 Act that have been answered by what was said in the body of the opinion, we now answer various additional contentions made by the defendants and intervenors.

I. Defendants' "Growth of Population" Argument

Defendants attempt to make the belated contention that "the Fourth and Sixth Districts . . . both . . . contain areas of rapid population growth since 1960 and such population growth was taken into consideration." Apart from the fact that no substantial evidence was introduced upon which such a finding could be based, such a contention is exploded by the following table which illustrates how Missouri's December 31, 1966 population, as estimated by the Missouri Division of Health, is distributed under the 1967 Congressional Districting Act:

Table Showing
Distribution of Missouri Population As
Estimated by Missouri Division of Health
For December 31, 1966 Under 1967 Act

District	Population[1]	Variation from Dec. 31, 1966 Ideal
1	481,377[2]	+ 30,531
2	481,377[2]	+ 30,531
3	481,377[2]	+ 30,531
4	433,071[3]	− 16,775
5	433,071[3]	− 16,775
6	442,445	− 7,401
7	412,140	− 30,305
8	481,377[2]	+ 30,531
9	481,377[2]	+ 30,531
10	370,844	− 79,002
	4,498,456	

1. The total estimated population for the State of Missouri on December 31, 1966 is 4,498,456. Thus, the "ideal district" for the projected figures is 449,846 per district.
2. These figures presume an exactly equal distribution of the projected population within Districts 1, 2, 3, 8 and 9 among those respective districts. Projected population data was not available for the wards and precincts of St. Louis City or for the townships of St. Louis County which are split between Districts 1, 2, 3, 8 and 9.
3. Projected population distributed exactly between 4th and 5th Districts.

The University of Missouri's College of Agriculture, in furtherance of its cooperative extension work authorized by the Acts of May 8 and June 30, 1914, and in cooperation with the United States Department of Agriculture, has published population projections for the years 1967, 1975, and 1990. The population projections of the Missouri Division of Health and those of the University of Missouri reflect some differences in detail. But those differences are not greater than is to be expected. Population projections are necessarily based on data concerning birth and death rates, past population trends, migration rates, and are usually straight line trend projections that call for the exercise of subjective expert judgment and also depend on the varying dependability of data at a particular time.

A comparison of the two population projections, however, establishes a remarkable general agreement in regard to

growth and decline trends of particular geographical areas of Missouri and in regard to where that population is situated in 1967, as compared to where it was situated when the 1960 census was taken.

The following table illustrates where, according to the University of Missouri's projected 1967 and 1975 figures, populations would be distributed under the 1967 Missouri Congressional Reapportionment Acts:

Table Showing
Distribution of Missouri Population
As Projected by University of Missouri
For 1967 and 1975 Under 1967 Act

	1967		1975	
District	Projected Population[1]	Variance	Projected Population[1]	Variance
1	486,207[2]	+ 27,330	596,530[2]	+ 62,081
2	486,207[2]	+ 27,330	596,530[2]	+ 62,081
3	486,207[2]	+ 27,330	596,530[2]	+ 62,081
4	446,814[3]	— 12,063	488,096[3]	— 46,353
5	446,814[3]	— 12,063	488,097[3]	— 46,352
6	444,444	— 14,433	583,480	+ 49,031
7	429,060	— 29,817	433,840	— 100,609
8	486,208[2]	+ 27,331	596,531[2]	+ 62,082
9	486,208[2]	+ 27,331	596,531[2]	+ 62,082
10	390,599	— 68,278	368,329	— 166,120
	4,588,768		5,344,494	

1. The "ideal districts" for the projected figures are 458,877 and 534,449, respectively, for 1967 and 1975.
2. See footnote (2) on table on Page 43.
3. See footnote (3) on table on Page 43.

The shortest answer in regard to defendants' contention about alleged population growth in Districts 4 and 6 is that it is **ex post facto** argument designed as an attempt to justify successive Missouri Legislatures' adamant and continued effort to malapportion in favor of rural geographical areas. There is no evidence whatsoever on which this Court could base a factual finding that the 1967 74th General Assembly adopted any policy of population projection in devising Districts 4 and 6, or any other district, in enacting the 1967 Act. And to adopt such a projection policy for only selected dis-

tricts, rather than on a state-wide basis, is so irrational that it could not be legally acceptable.

Calkins v. Hare, supra, at 828, we believe correctly observed that "Any districting, however disparate with respect to population, may conceivably be justified by saying the Legislature expected the area to either shrink or to grow." That case correctly stated that "If such a suggestion, without more, suffices to justify gross population disparities, then an easy answer to a constitutional denial has indeed been found." Judge Talbot Smith put his finger on one of the difficulties inherent in the use of any population "trends." He said that "the difficulties in respect to their use is that a basic constitutional right may be lost to a speculative future event, an unequal trade at best and at worst a cynical deprivation." **Calkins v. Hare** found that "no proofs whatever" were offered that the Michigan legislature had in fact rationally considered any population trend as a justification of the variances created by its congressional districting act. We make the same finding in regard to the 1967 Missouri Legislature.

Further reflection since our decision in **Preisler II** on the question of continued use of the 1960 population figures that obviously must favor rural populations over urban in the year 1967 has convinced us that it was the obvious intent of Art. I, §2 of the Constitution of the United States to tie congressional reapportionment and congressional districting to decennial census required by that same Section (See Appendix D for a full statement of the reasons for our considered view of this question). Article 3, Section 45 of the 1945 Constitution requires, consistent with the policy established by Art. I, §2 of the Constitution of the United States, that Missouri draw new congressional districts "of contiguous territory as compact and as nearly equal in population as may be" after each national census. We therefore hold that

any Missouri Legislature that attempts to reapportion this State before the 1970 census figures are available may disregard estimates and projections of the 1960 census if it determines so to do.

What we have said in connection with defendants' population growth argument in regard to Districts 4 and 6 is equally applicable to their argument that "the eighth district . . . includes Fort Leonard Wood which has a great proportion of transitory population, the University of Missouri with a great number of non-voting students . . . and Jefferson City which has many state employees who retain a voting residence in other areas of the state [all of which was allegedly] considered by the legislature."

The final and complete answer to all of defendants' attempted **ex post facto** rationalizations is that they have been expressly rejected by the Supreme Court of the United States. **Davis v. Mann**, 377 U.S. 678 at 691 held:

> We reject appellants' argument that the underrepresentation of Arlington, Fairfax and Norfolk is constitutionally justifiable since it allegedly resulted in part from the fact that those areas contain large numbers of military and military-related personnel. Discrimination against a class of indviduals, merely because of the nature of their employment, without more being shown, is constitutionally impermissible. **Additionally, no showing was made that the Virginia Legislature in fact took such a factor into account in allocating legislative representation.** And state policy, as evidenced by Virginia's election laws, actually favors and fosters voting by military and military-related personnel. (emphasis ours).

The Attorney General of Missouri, in Opinion No. 251, has ruled that "Military personnel at Fort Leonard Wood who are qualified may register and vote in the county where reservation is located, if they have established residence in the State of Missouri, and non-payment of taxes may not

disqualify them" (V.A.M.S., Supp. §110.060, note 10). See also Op. Atty. Gen. No. 93, (V.A.M.S., §111.060, note 10). **Davis v. Mann** affirmed the Virginia three-judge court that "put the burden of explanation on defendants, and found that they had failed to meet it" (377 U.S. at 683). Actual introduction in evidence of "various exhibits showing the numbers of military and military personnel in the City of Norfolk and in Arlington and Fairfax Counties" (377 U.S. at 682) was held to be insufficient evidence in **Davis v. Mann** to carry the burden of proof.

All that defendants introduced in this case was the hearsay testimony of party leaders whose duty it was to do the best they could with an apportionment act that had, in fact, to borrow Judge William E. Doyle's language, been "designed and dictated . . . by political expediency" (from **Lisco v. Love**, D.C. Colo. 1963, 219 F.Supp. 922 at 942). Any finding that the 1967 Missouri Legislature in fact took the actual military, student, or state employee population into account in drawing District 8 or any other district in its 1967 Act would obviously be set aside as clearly erroneous. How could the 1967 Missouri Legislature have considered that particular segment of Missouri population when it did not even actually know the total population of Missouri? Further discussion is redundant.

II. Defendants' Contention That The Art. I, §2 Standard of "As Nearly Equal As Is Practicable" Is Not a Precise Constitutional Standard

Historically speaking, the legislative branches of both the State and federal governments participated in a long period of bold and blatant disregard of Art. I, §2 of the Constitution unrestrained by traditional judicial review of alleged constitutional infringement. That fact has tended to obscure the further fact that the constitutional standard of Art. I,

§2 expressed by the words "as nearly as is practicable," is a standard well established in law and was not one but recently introduced into the political language of our country by the Supreme Court of the United States in **Wesberry v. Sanders.**

Many persons, including infrequently a judge, erroneously attempt to convince themselves that when **Wesberry v. Sanders** used the truly ancient language of "as nearly as is practicable," the Supreme Court was somehow talking about something attainable as a matter of practical politics. The uninformed ignore not only the difference between the meaning of the words "practicable" and "practical," but much of the history and hard experience of this Nation. A recent, but promptly reversed, rare judicial example of such thinking was the majority opinion's statement in **Lucas v. Rhodes**, N.D. Ohio, decided May 12, 1967 but not yet reported, that "an element of 'practicality' is implicit in the concept of 'practicability' as that term is to be applied in a districting case." The Supreme Court reversed December 5, 1967 in a single sentence per curiam opinion. See 36 Law Week 3225.

In **Preisler II** we did not deem it necessary to do more than to call attention to the language of Mr. Justice Black's dissent in **Colegrove v. Green** where he used the words "so far as feasible" synonymously with "as nearly as is practicable" language of **Wesberry v. Sanders.** On page 973 of **Preisler II,** we stated:

> Use of such words as "feasible" and "practicable" in a careful statement of the fundamental constitutional principle constitutes but a recognition that the familiar doctrine of **de minimis** is applicable and is designed to make clear that a State legislature would not be expected to create entirely new political subdivision lines in order to have absolute and precise mathematical equality in its congressional districts.

Defendants' insistence that "as near as practicable" has something to do with what a group of political leaders choose to call a "reasonable and practical political compromise," together with certain language in some of the apportionment cases, suggests that we add to what was said in **Preisler II.**

Should a court accept the sophistic argument that the words "as nearly as is practicable" are not words of precise and historic meaning, it is but a short step to saying that those words have little meaning at all. Should that step be taken it is apparent that a rationale could be developed under which the decision of a particular apportionment case would turn, not on the question of whether a particular apportionment plan does in fact contain congressional districts "as nearly equal [in population] as is practicable," but upon the subjective and generalized judgment of whether, as a matter of practical politics, a particular state legislature could or could not have come closer to complying with the constitutional command of Art. I, §. In **Preisler II** we finally rejected "the idea that an apportionment plan can be 'slightly unconstitutional'." That determination is the law of this case.

The rationale of the two judge majority in the recent Ohio three-judge case is an example of what we believe to be an invitation to follow a primrose path through the thicket that courts, both State and federal, are now required to enter. That opinion, before the Supreme Court's most recent reversal, attempted to say that the Supreme Court's use of the "as nearly as is practicable" standard in **Wesberry v. Sanders** "established no precise definition of 'practicability'" (xiii). Having made that erroneous assumption, unsupported by any Supreme Court decision, the two Ohio federal judges felt free to add that "all the law and the courts expect [is] the best obtainable result; the most practical

result, will . . . have to suffice" (xvii). Without any support in any decision of the Supreme Court, those two judges attempted to avoid application of the constitutional standard of "as nearly as is practicable" to the facts established in the Ohio case by erroneously assuming that "an element of 'practicality' is implicit in the concept of 'practicability' as that term is to be applied in a districting case" (xxiii). We believe that the Supreme Court's reversal of the Ohio case must be read as an implicit rejection of the rationale upon which the lower court based its approval of the Ohio congressional plan for reasons we shall state.

The introduction and long time use of the words "as nearly as practicable" as a term of art and as a part of the language of congressional apportionment is much older than the Apportionment Act of February 2, 1872 (17 Stat. 28 (1872); the first act of Congress to use those words. Congress, of course, continued to use those exact words in each of its successive apportionment acts up to and including the Act of August 8, 1911, which appeared as Section 3 of Title 2, United States Code, still printed in U.S.C.A. (For the long history of congressional use of "as nearly as practicable," see **Wood v. Broom**, 287 U.S. 1 (1923)).

And when President Truman tried to get the Eighty-second Congress to do something about congressional failure to deal with congressional malapportionment he used the same well-understood language when he recommended that Congress pass a bill that would have provided that districts "be composed of contiguous and compact territory and contain as nearly as practicable, the same number of individuals." See Message from the President of the United States H.R. Doc. 36 82d Cong. 1st Sess. (Jan. 9, 1951).

A review of much earlier Congressional apportionment history reveals the circumstances under which the words

"as nearly as practicable" acquired their precise and established meaning. Interestingly enough, reference to that early history is to be found in decisions written by the Supreme Court of Missouri.

Missouri has traditionally been one of many states that made valiant attempts not to leave apportionment problems, to use Congressman Celler's words, "to the whims and uncontrolled discretion of the legislature" (see footnote 10 above). Section 6 of Article 4 of the 1875 Missouri Constitution required, for example, that the state senatorial districts be elected from "districts of compact and contiguous territory, and of population as nearly equal as may be." State ex rel. Barrett v. Hitchcock, supra, illustrates the reason why a Missouri court fifty years ago had no difficulty with the "as nearly equal as may be" language in the 1875 Missouri Constitution. That court was familiar with where and under what circumstances those words had been incorporated into the language of apportionment. The Missouri Supreme Court in 1912 adopted the following language from the still earlier case of Parker v. State, 133 Ind. 178, 32 N.E. 836, 18 L.R.A. 567, which noted that "A question somewhat similar to the one now under discussion arose in the Congress of the United States in the year 1832, relative to the construction to be placed upon section 2, art. 1, of the Constitution of the United States" (page 64 of 146 S.W.).

It then noted that the question had been referred to a committee on which Daniel Webster served as chairman. The Indiana court, writing in 1892, quite correctly stated what Congress finally did in 1872 when it wrote the "as early as practicable" standard into the federal code. It stated:

> The rule recommended by this committee was subsequently adopted by Congress, so that Representatives

are now apportioned among the several states of the Union under it as a fixed and binding obligation. (supra, at p. 65).

We make a more detailed examination of the 1832 report made by Daniel Webster because the words "as nearly as practicable" acquired their well established meaning from what Daniel Webster said in his specific discussion of Art. I, §2 of the Constitution which he spent a lifetime defending.

In the year 1832 Daniel Webster said the following in regard to the language of Art. I, §2:

> There would seem to be little difficulty in understanding these provisions. The terms used are designed, doubtless, to be received in no peculiar or technical sense, but according to their common and popular acceptation. To **apportion**, is to distribute by right measure; to set off in just parts; to assign in due and proper proportion . . . Representation founded on members, must have some limit, and being, from its nature, a thing not capable of indefinite subdivision, it cannot be made precisely equal. . . . It is quite obvious therefore, that the apportionment of representative power can never be precise and perfect. There must always exist some degree of inequality. [Senate Report, 22d Congress, 1st Sess., Doc. No. 119 (1832)] p. 4 (Emphasis in original).

The obvious problem, recognized both by Webster and by every court that has since looked at Art. I, §2 was not difficult to solve if one wished to apply principle, as distinguished from whim. Webster recognized, as did **Wesberry v. Sanders**, that:

> The constitution, therefore, must be understood not as enjoining an absolute relative equality—because that would be demanding an impossibility—but as requiring of Congress to make the apportionment of representatives among the several States, according to their respective numbers, **as near as may be.** That which can-

not be done perfectly, must be done in a manner as near perfection as can be. If exactness cannot, from the nature of things, be attained, then the greatest practicable approach to exactness ought to be made (id. p. 4) (Emphasis in original).

Webster made clear that the Congress was bound by Art. I, §2 of the Constitution because "Congress is not absolved from all rule, merely because the rule of perfect justice cannot be applied." In typical language Webster added:

> In such a case, approximation becomes a rule; it takes the place of that other rule which would be preferable, but which is found inapplicable, and becomes, itself, an obligation of binding force. The nearest approximation to exact truth or exact right, when that exact truth, or that exact right cannot itself be reached, prevails in other cases, not as matter of discretion, but as an intelligible and definite rule, dictated by justice, and conforming to the common sense of mankind; a rule of no less binding force in cases to which it is applicable, and no more to be departed from than any other rule or obligation.
>
> The committee understands the constitution as they would have understood it, if it had said, in so many words, that representatives should be apportioned among the States according to their respective members, **as near as may be**. If this be not its true meaning, then it has either given, on this most delicate and important subject, a rule which is always impracticable, or else it has given no rule at all; because, if the rule be that representatives should be apportioned **exactly** according to numbers, it is impracticable in every case; and if, for this reason that cannot be the rule, then there is no rule whatever, unless the rule be that they shall be apportioned **as near as may be.**
>
> This construction, indeed, which the committee adopt, has not, to their knowledge, been denied; and they proceed in the discussion of the question before the Senate, taking for granted that such is the true and undeniable

meaning of the constitution. (Emphasis Daniel Webster's). (p. 5).

As to where the burden lay in regard to sustaining an apportionment, Webster anticipated **Swann v. Adams III** by one hundred and thirty-five years. Webster said in 1832 that:

> Without disturbing the proposed number of the House, the mere changing of these three members from and to the six States respectively, would bring the representation of each of the whole six, nearer to their due proportion, according to their respective numbers, than the bill, in its present form, makes it. In the face of this indisputable truth, how can it be said that the bill apportions these members among those States according to their respective numbers, **as near as may be?**
>
> The principle on which the proposed amendment is founded . . . is little other than a transcript of the words of the constitution, and its results are mathematically certain. The constitution, as the committee understand it, says, representatives shall be apportioned among the States according to their respective numbers of people, **as near as may be.** The rule adopted by the committee, says, out of the whole number of the House, that number shall be apportioned to each State which comes nearest to its exact right according to its number of people. . . . What the constitution requires, is the nearest practicable approach to precise justice. The rule is approximation; and we ought to approach, therefore, on which ever side we can approach nearest. (Emphasis Daniel Webster's) (p. 7).

Courts that have been forced to answer present day arguments which have been based upon the erroneous idea that the "as nearly as is practicable" language of **Wesberry v. Sanders** is somehow vague or imprecise have had no more difficulty with that argument than the Indiana court had over fifty years ago. In **Jones v. Falcey**, 48 N.J. 25, 222 A.2d 101 (1966), for example, the Attorney General of New Jersey

argued that "as nearly as is practicable" could be taken to mean that which is represented to be the best political compromise within the ambit of what is called political legislative politics. Chief Justice Weintraub, of the Supreme Court of New Jersey, correctly stated that "The Constitution, as construed in **Wesberry** and **Reynolds**, does not contemplate that there is a range of deviation within which a State may maneuver, with or without reason." In regard to the "as nearly as practicable" language of **Wesberry v. Sanders**, it was stated:

> The command is to achieve population equality "as nearly as practicable" and if equality would be more nearly achieved by shifting whole municipalities to a contiguous district, the draftsman has not achieved equality "as nearly as practicable," unless some other constitutionally tenable reason (if there is any) can be shown to justify the disparity. If the lines of political subdivisions are ignored, there is no apparent reason for not achieving mathematical equality, subject of course to inevitable **de minimis** variations. (222 At. 2d 107-108).

In **Swann v. Adams III** the defendants contended, as do defendants in this case, that the Florida "plan comes as close as **'practical'** to complete population equality" (385 U.S. at 445) (emphasis ours). The Supreme Court rather curtly answered the argument that "practicable" may be taken to mean "practical" by holding that "it seems quite obvious that the State could have come much closer to providing districts of equal population than it did" (385 U.S. at 445). After noting that the plaintiffs had "placed before the court their own plan which revealed much smaller variations between the districts" and that "appellants suggested to the District Court specific amendments to the legislative plan, which, if they had been accepted, would have measurably reduced the population differences between many of the dis-

tricts," the Supreme Court held that such facts "demonstrate that a closer approximation to equally populated districts was a feasible undertaking" (385 U.S. at 445-446) (emphasis added).

It is apparent that even in state apportionment cases, where admittedly there is more permissible play at the joints than in congressional districting, the rule is one of "practicability" rather than political "practicality." The principle applicable to all apportionment cases, regardless of whether they involve State or congressional districting, is whether it was practicable or, to use the synonymous word "feasible" for the apportioning body to "have come much closer to providing equal districts than it did" and whether "specific amendments . . . which, if . . . accepted, would have measurably reduced the population differences between many of the districts" (385 U.S. at 445).

Such facts, if established in a particular case, the Supreme Court has held "demonstrate that a closer approximation to equally populated districts was a feasible undertaking" (385 U.S. at 445-446). This means, of course, that the apportionment plan must be held unconstitutional unless a particular State carries the burden of showing that the obvious variances were either unavoidable or justified on some legally acceptable ground.

Until prohibited in 1932 by **Wood v. Broom**, supra, from exercising jurisdiction to enforce the then sixty year old Congressional requirement that congressional districts be compact, contiguous and contain "as nearly as practicable" an equal number of inhabitants, the federal courts had no difficulty whatsoever in either understanding that language or in applying the standard it established to the facts presented by particular cases.

In **Broom v. Wood**, S.D. Miss. 1932, 1 F.Supp. 134, for

example, a lower three-judge court held that the Mississippi legislature had not complied with the congressional command that had been on the books since 1872. That court held that the congressional "act is mandatory and must be followed by the states in fixing congressional districts" (1 F.Supp. at 135).

It held that Mississippi variances there involved were "clearly violative of the . . . act of Congress and illegal and void." (Ibid).

In **Hume v. Mahan**, E.D. Ken. 1932, 1 F.Supp. 142, a federal court in Kentucky ruled the 1932 Kentucky congressional apportionment to be in violation of the "as nearly as practicable" standard established by the Congress. That court concluded that the Kentucky Congressional districting act "was framed in deliberate disregard of the federal statute" (1 F.Supp. at 149). After setting out the factual situation concerning the population of the counties of Kentucky, that court held that: "In view of this situation, the Legislature was confronted with no difficulty whatever in dividing these one hundred and nineteen counties into eight congressional districts of substantially equal population, and this without the necessity of dividing any county; and the topography of the state presents no obstacle to carving these districts out of contiguous and compact territory" (id. at p. 150).

In anticipation of the rule of decision now settled by **Swann v. Adams III** and **Kilgarlin v. Hill**, that court stated thirty years ago that:

> As an example of the ease with which these one hundred and nineteen counties can be erected into eight congressional districts, composed of contiguous and compact territory and with substantially equal population, the court during the argument called upon counsel for the plaintiff to file a map showing if and how this could

be done. Such map was prepared and filed as an exhibit in the case. This map shows that these counties could have been laid off into eight congressional districts with no greater difference in population between them than approximately 4,000 people, and this without doing violence to the requirement that the districts must be composed of compact and contiguous territory. (Id. at p. 150).

That court made clear that "no real difficulty confronted the Legislature in substantially complying with the federal law." That court added that "Instead of doing so, however, the Legislature, without any reason whatever so far as I can discover other than the exigencies of practical politics, in redistricting the state worked out a gross inequality in population between the respective districts." After further analysis of the actual distribution of population of Kentucky, the court held, again anticipating current apportionment rules of decision by thirty-five years, that:

> In view of the ease with which these discriminations could have been avoided, we are forced to the conclusion that no attempt was made to avoid them, but that other considerations than the securing of equality of population dictated the laying out of these districts. (Ibid)

This case was, of course, reversed on the authority of **Wood v. Brown**, supra. See **Mahan, Secretary v. Hume**, 287 U.S. 575. But such reversal was based solely on the ground that the Congress, after having failed to enact any reapportionment act following the 1920 census, had also intentionally failed to include the 1872 standard of "as nearly as practicable" in its bill to be applicable to the reapportionment under the 1930 census. The two federal cases just cited were, of course, decided on the theory that the "as nearly as practicable" standard was still in effect as a congressional command under the Act of August 8, 1911. What those courts

said in regard to how that standard should be applied is as good law today as it was when written over thirty years ago. The fact that **Wesberry v. Sanders** made the "as nearly as practicable" a constitutional standard does not affect the validity of the rationale applied by those cases.

The standard of "as nearly as practicable" means today what it meant to Daniel Webster and has meant throughout our history. Within the context of congressional districting, if plans before the legislature or in evidence before a court establish that more equal districting was obtainable than that which was adopted, then obviously the plan enacted, on the facts, does not meet the now constitutional command that the districting be equal "as nearly as is practicable."

It should be apparent that efforts to substitute considerations of "practical politics" and ideas of "best legislative compromise" for the historic meaning of the now constitutional command of "as nearly as practicable" were foreclosed by the Great Compromise, as embodied in Article I, §2, and as interpreted by **Wesberry v. Sanders**. It should also be apparent to all who want to understand that the legislative bodies of this Nation no longer have a license to violate the plain and explicit commands of the Constitution of the United States, that those who make the laws are required to follow the Constitution in the same manner as all other persons, and that all failure to do so are subject to the same traditional judicial remedies that our continuing experiment has evolved from the time of John Marshall.

III. Defendants' "Comparative Table" Argument

Defendants set forth on pages 19 and 20 of their brief a table on which the various States have been ranked according to what defendants have labeled "Total % of Deviation" column.[13] Missouri is ranked eighth on that table. Defendants argue that "an examination of the table dra-

matically demonstrates that the Missouri Congressional Districts all fall well within **de minimis** variations."

In **Davis v. Mann**, supra, the defendants introduced in evidence (as distinguished from simply putting unsupported and inaccurate data in their brief) the "results of a comparative study of state legislative apportionments which show Virginia ranking eighth among the States in population-based legislative representativeness" (377 U.S. at 682). The Supreme Court rejected defendants' attempted justification based on that sort of comparative data. **Swann v. Adams III** is even more explicit in its holding that "the fact that a . . . variation from the norm is approved in one State has little bearing on the validity of a similar variation in another State" (385 U.S. at 445). See also **Reynolds v. Sims**, 377 U.S. 533 at 578, holding: "What is marginally permissible in one State may be unsatisfactory in another, depending upon the particular circumstances of the case."

Those three Supreme Court cases dispose of defendants' comparative table argument. Tabulations of the sort defendants have presented to this Court in all three of the **Preisler** cases reflect an exceedingly short chapter of the long history of malapportionment in the United States. A more complete history of congressional reapportionment establishes that whatever present rank may be assigned a particular State, such ranking has not been attained without recent judicial encouragement, and, in some instances, actual court order.

A more meaningful history is obtained when the data set forth in Appendix I attached to the opinion of Mr. Justice Frankfurter in **Colegrove v. Green**, 328 U.S. at 557, and that set forth in the Appendix attached to Mr. Justice Harlan's dissent in **Wesberry v. Sanders**, 376 U.S. at page 49, is cumulated in a single table. We present data for a limited number of the "better" States; the history of every State in the

country presents a picture different only in degree from her sister States.

The following table performs that function:

Congressional Malapportionment Showing Pre-*Wesberry v. Sanders* (1964) Maximum Variances Between Largest and Smallest Districts of States Ranked on Defendants' 1967 Chart

Additional Data Compiled from Appendix I attached to Mr. Justice Frankfurter's dissenting opinion in Colegrove v. Green, 328 U.S. 549, at 557-559, and Appendix to Mr. Justice Harlan's dissenting opinion in Wesberry v. Sanders, 376 U.S. 1, at 49-50.

State	1897	1928	1946	1960	1967
Florida	202,792	315,292	439,895	660,345	415,704
	188,630	187,474	186,831	237,235	407,677
	14,162	127,818	253,064	423,110	8,027
Arkansas	220,261	330,292	423,152	575,385	453,567
	147,806	180,348	177,476	332,844	443,892
	72,455	149,944	245,676	242,541	9,675
Maryland	208,165	311,413	534,568	711,045	393,210
	153,912	194,568	195,427	243,570	383,237
	54,253	116,845	339,141	467,475	9,973
Utah	1 Rep.	229,907	293,922	572,654	451,864
	(At	219,489	256,388	317,973	438,763
	Large)	10,418	37,534	254,681	13,101
Michigan	191,841	533,748	419,007	802,994	417,026
	148,626	198,679	200,265	177,431	403,263
	43,215	335,069	218,742	625,563	13,763
Oklahoma	Not yet	325,680	416,863	552,863	396,161
	Admitted	189,472	189,547	227,692	380,734
		136,206	227,316	325,171	15,427
Tennessee	199,972	296,396	388,938	627,019	404,968
	153,773	145,403	225,918	223,387	388,240
	46,199	150,993	163,020	403,632	16,728
North Carolina	204,686	408,139	358,573	491,461	423,750
	160,288	202,760	239,040	277,861	406,474
	44,396	205,379	119,533	213,600	17,276
Montana	1 Rep.	333,476	323,597	400,573	347,701
	(At	215,413	235,859	274,194	327,019
	Large)	118,063	87,738	126,379	20,682

The cumulated data reflects the historic pattern of congressional malapportionment before 1964 (when **Wesberry v. Sanders** was decided) and the dramatic impact of that decision. William J. D. Boyd, editor of the National Civic Review, writing in the April, 1966 issue of that publication, accurately summarized the post-**Wesberry v. Sanders** con-

gressional apportionment history when he stated that: "Comparatively little fanfare has accompanied the wholesale change in congressional districts that has taken place since February, 1964, when the United States Supreme Court ordered that they be substantially equal in population." He reported that within the first two years after **Wesberry v. Sanders** that 25 States had completed their redistricting, adding that "Although the redistricting process has caused several disputes, the pace of congressional change has been more rapid and less controversial than state legislative reapportionment; therefore the Press has taken far less notice of the changes taking place."

The most recent statement of post-**Wesberry v. Sanders** progress was that made by Senator Howard Baker of Tennessee to the United States Senate on November 8, 1967. (Cong. Rec. 90th Cong., 1st Sess., S 16111). He there stated that "since the **Wesberry** decision, district lines have been reshaped in 33 States." He added that "many States redistricted voluntarily; some only with the encouragement of a court's order; and, in a few States where the legislators could not agree, the courts themselves redrew the lines."

The bare bones statement of why and how the States on the above table came to redistrict after **Wesberry v. Sanders** was decided, is as follows:

State	Action Taken Subsequent to Wesberry v. Sanders
Florida	Court ordered plan in Gong v. Kirk, supra, after repeated legislative failures.
Arkansas	Legislature adopted present plant following Park v. Faubus, E.D. Ark., 1965, 238 F.Supp. 62.
Maryland	Court ordered plan in Maryland Citizens Comm. for Fair Cong. Red. v. Tawes, supra, after repeated legislative failures.
Utah	Voluntary legislative action subsequent to Wesberry v. Sanders; no additional court action was necessary.
Michigan	Legislature adopted present plan following Calkins v. Hare, E.D. Mich., 1964, 228 F.Supp. 824.

Oklahoma	Voluntary legislative action subsequent to Wesberry v. Sanders; no additional court action was necessary.
Tennessee	Court ordered plan in Baker v. Ellington, supra, after repeated legislative failures.
North Carolina	Legislature adopted present plan after two earlier failures; held to be not unconstitutional in Drum v. Seawell, supra.
Montana	Legislature adopted present plan following Roberts v. Babcock, D. Mont., 1966, 246 F.2d 396.

Consistent with **Davis v. Mann's** determination that the fact that a study showed "Virginia as ranking eighth among the States" was immaterial, we reject defendants' **Preisler III** argument that Missouri "ranks eighth among the States" as being totally irrelevant to the question of whether the 1967 Missouri Act has in fact and in law divided the State of Missouri into congressional districts as nearly equal in population as is practicable in accordance with the command of both the Missouri and United States Constitutions.

Defendants also argue that their table shows that, "by comparison, the recent efforts of the Missouri Legislature in congressional redistricting are truly commendable." Apart from the fact that comparison is not a proper criterion under the Supreme Court cases, the hard facts concerning Missouri's reapportionment efforts cannot fairly be said to be "truly commendable." The history of congressional reapportionment in Missouri, like that of all her Sister states, shows that progress has been made. But it is one thing to say that progress has been made; it is quite another thing to say that progress can be described as commendable, unless, of course, that progress has been sufficient to comply with the Constitution.

The facts in regard to Missouri's progress establish that in 1928, shortly before Missouri's most recent congressional election at large, the variation between its highest district (pop. 521,587) and its lowest (pop. 138,807) was 382,708.

The converse of the fear expressed by Missouri Congressman Bowlin in 1844 that "One vote in St. Louis [would be made] equal to four or five in the country" had in fact come to pass; the ratio, however, was nearly the same.

From 1928 to 1932, when representatives were being elected from those malapportioned districts, a majority of Missouri's population for the first time in her history, began to live in urban areas. But throughout all that time only three of Missouri's representatives were elected from St. Louis and one from Kansas City; with the remaining 12 of the then 16 member delegation from outstate Missouri.

Forced to reapportion by a loss in representation under the 1960 census, Missouri cut the variation between its highest and lowest district to 128,355 by its 1961 Act. That Act was held constitutionally void in **Preisler I.** Following that decision, Missouri, by its 1965 Act, cut the variance between the highest and the lowest districts to 84,655. The 1965 Act was held constitutionally void in **Preisler II.** The 1967 Act, which we today hold to be unconstitutional, only cut the variance between the highest and lowest district to 25,792. We fail to understand how comparison with the infinitely better job an increasingly large number of other States have done to protect the constitutional rights of their citizens can be said to support an argument that Missouri's progress should be called "truly commendable." The progress of no State, including Missouri, can fairly be said to be commendable until and unless such a State fully and fairly complies with the command of both State and federal constitutional law.

Missouri's progress cannot fairly be described as commendable when viewed in light of the fact that the legislatures of both Utah and adjoining Oklahoma voluntarily complied with **Wesberry v. Sanders** without the necessity

of any further court action. Those States enacted what are apparently substantially better plans than those which Missouri has been able to enact after three abortive attempts. The legislatures of Michigan, Montana, and adjoining Arkansas needed to be told only once by a federal three-judge court for the legislatures of those three States to do an apparently better job than Missouri has been able to do in three separate attempts.

Indeed, the unvarnished truth is that Missouri is one of only four of the fifty States in the Union that has had to be told more than twice that the Constitution of the United States must and will be enforced as the Supreme Law of the Land in order that the people of the United States who reside in Missouri have government by law rather than by men.

It is quite apparent that a broader review of Missouri's progress in congressional apportionment presents quite a different picture of the quality of the efforts by recent Missouri legislatures. We cannot find that those efforts are commendable because we cannot find that Missouri has yet complied with the command of Art. I, §2 of the Constitution.

IV. Defendants' Attempted Reliance On Recent Mississippi Case Not Tenable

As a facet of their untenable comparative table argument, defendants direct particular attention to the unreported decision of the Mississippi three-judge court in **Connor v. Johnson**, S.D. Miss. No. 3830, decided September 30, 1966, affirmed by the Supreme Court per curiam 386 U.S. 483 (1967).

Defendants insist that the Supreme Court's affirmance of that case in fact approved the variances contained in the 1966 Mississippi congressional plan, and therefore contend that "the constitutionality of the 1967 Missouri Redistrict-

ing Act is amply demonstrated by this Mississippi decision."[14] We do not agree.

Considerations implicit in Rule 15(c) of the Supreme Court of the United States and the principle of appellate review repeatedly announced and specifically applied by the Supreme Court in apportionment cases, prohibits this Court from holding that the Supreme Court in any way intended, by affirmance of **Connor v. Johnson**, to approve the variances contained in the 1966 Mississippi plan or to overrule what it had so recently stated in **Swann v. Adams III** and **Kilgarlin v. Hill**.

Rule 15(c) of the Rules of the Supreme Court of the United States requires that the "questions presented" by an appellant be separately set forth in appellant's Jurisdictional Statement and that while "the statement of a question presented will be deemed to include every subsidiary question fairly comprised therein," appellants are put on notice that "only questions set forth in the jurisdictional statement or fairly comprised therein will be considered" and that "the jurisdictional statement may not raise additional questions or change the substance of the questions already presented."

Wesberry v. Sanders, supra, in order to foreclose any possible future claim of confusion, expressly stated that the decision in that case was limited to the question presented under Art. I, §2. The Supreme Court stated: "We do not reach the arguments that the Georgia statute violates the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment" (376 U.S. at 8, footnote 10).

The fact that a Fourteenth Amendment apportionment challenge can not be said to be included **ipso facto** in a case which presents only an Art. I, §2 inequality of population

question was underlined the very day **Wesberry v. Sanders** was decided. In **Rockefeller v. Wright**, 376 U.S. 52 at 58, the Supreme Court emphasized "We do not pass on the question which appellants have not presented here, that is, whether the state apportionment [the New York Congressional District Act] is constitutionally invalid because it may fail in its objective to create districts based as nearly as practicable on equal population." Specific attention was there directed to **Wesberry v. Sanders**, in which an inequality of population question under Art. I, §2 was presented and decided the same day.

Wright v. Rockefeller made it clear that the Supreme Court's affirmance of a lower three-judge court's rejection of a Fourteenth Amendment challenge may not, under any circumstances, be considered by a future lower court as an approval of population variances that may appear in the challenged congressional apportionment. The Supreme Court stated that its holding on a Fourteenth Amendment question "has no bearing on [the] wholly separte question" that would be presented by an Art. I, §2 challenge because "no such challenge has been urged here, the issues have not been formulated to bring it into focus, and the evidence has not been offered or appraised to decide it.[18] The same principle governing the scope of the Supreme Court review was stated and applied in **Lucas v. Colorado Gen. Assembly**, 377 U.S. 713 (1964), at 726, 730, and **Fortson v. Dorsey**, 379 U.S. 433 (1965) at 439.

In order that there could be no doubt about what questions were in fact presented to both the Mississippi three-judge court and to the Supreme Court of the United States we requested copies of and we have carefully reviewed the jurisdictional Statement filed by Appellants and Appellees' Motion to Dismiss or Affirm filed in the Supreme Court.

The questions presented to the District Court for the Southern District of Mississippi were detailed in its opinion. The six contentions of the plaintiffs as set forth on page 32, contain no mention whatever of Art. I, §2 nor do they make any reference to any alleged abridgement of the denial of the one-man, one-vote principle. Every contention there stated involved a Fourteenth Amendment challenge of racial gerrymander or discrimination.

The "Question Presented" to the United States Supreme Court as set forth on page 2 of Appellant's Jurisdictional Statement was whether the 1966 Mississippi congressional districting plan violated "the Fourteenth and Fifteenth Amendments to the U.S. Constitution."

Appellees appropriately responded to appellants' statement of the question presented on page 3 of their supporting brief by stating that: "Art. I, Sec. 2 of the U.S. Constitution . . . was not invoked in the lower court and has not been sought to be invoked here."

Our examination of the pleadings and briefs filed in the Supreme Court in the appeal of **Connor v. Johnson** establishes that, as in "**Wright v. Rockefeller**, no Art. I, §2 inequality of population question was presented to the Supreme Court in connection with the recent Mississippi case; that the issues concerning that wholly separate question were not formulated to bring such a challenge in focus; and that no evidence was offered or appraised by the lower court to decide such a question. It is therefore clear that the Supreme Court's affirmance of the Mississippi three-judge court cannot be said to constitute in any respect an approval of the variances contained in the Mississippi congressional districting plan. We so hold.

The only collateral relevancy the Mississippi litigation has to this case is the fact demonstrated by that litigation

that a State legislature can act with much greater promptitude in apportionment matters than it has ever acted in the past once it makes up its mind that prompt action is necessary.

Our review of that litigation shows that it was on October 19, 1965 that the Mississippi Freedom Democratic Party filed in federal court its first challenge to the obviously malapportioned Mississippi congressional districting. That initial challenge was an Art. I, §2 challenge. The 1966 Mississippi Legislature, faced with the almost certain prospect of an election at large, in spite of apportionment difficulties in its 1932 session (described as a "long and acrimonious battle"), in 1952 session (described as reflecting "reluctance and inability to agree"), and in its 1962 session (described as having "kept the Legislature in an uproar for a major portion of its term"), was in fact able to pass a new congressional act in truly record speed. Indeed the Mississippi legislature passed a new redistricting act before a three-judge federal court could be assembled to hear the Art. I, §2 challenge.

It was in the face of that unusually prompt legislative action that plaintiffs amended their complaint in order to challenge the constitutionality of the newly enacted 1966 Mississippi Act as a violation of rights guaranteed by the Fourteenth and Fifteenth Amendments. It was under those circumstances that the Art. I, §2 population inequality challenge was, in effect, eliminated from consideration in the Mississippi three-judge court case.

It is significant that the same three-judge Mississippi court that decided the Mississippi congressional case has subsequently made clear that it fully understands that the Supreme Court announced additional controlling principles applicable to all future apportionment litigation when it

decided **Swann v. Adams III** and **Kilgarlin v. Hill**. See **Connor v. Johnson**, S.D. Miss. 1967, 265 F.Supp. 492.

The impact of those Supreme Court cases on future apportionment litigation in Mississippi is made clear by the Mississippi three-judge court when it held last March 3, 1967 that:

> An examination of the decision [**Swann v. Adams III**] made it crystal clear that Senate Bill No. 1504 was fatally defective unless the variations above described could be explained on the basis of rational state policy, such as the integrity of political subdivisions, the maintenance of compactness and contiguity in legislative districts, or the recognition of natural or historical boundary lines. (265 F.Supp. at 493-4).

The consequence of a State legislature's refusal to make and keep accurate records of its legislative deliberations was made apparent by the Mississippi court in its most recent apportionment case. The court stated that it had "entered a formal order giving the State an opportunity to offer [the] explanations now required by **Swann v. Adams**. Consistent with what every court has considered the impact of **Swann v. Adams III** to be, the Mississippi three-judge court held that it had no alternative except to "find Senate Bill No. 1504 to be unconstitutional on its face, null and void" because "the Mississippi Legislature keeps no stenographic report of its debates and requires no formal committee reports other than recommendations as to passage or rejection, it was impossible for the Attorney General to file [any] explanation" (265 F.Supp. 492 at 494).

Future Missouri Legislatures and the Attorney General of Missouri would be well advised to heed the teaching of this latest declaration of the Mississippi three-judge court should some new act of a future Missouri General Assembly be made the basis of some new motion to seek approval of some new apportionment plan.[16]

APPENDIX D

Discussion of Constitutional Significance of Inclusion of Constitutionally Required Decennial Census in Art. 1, §2 As It Relates to Use of Data Other Than Federal Census in Drawing Congressional Districts

The purpose of this Appendix is to place in historical perspective the constitutional significance of the inclusion of the decennial census in Art. I, §2 of the Constitution as an integral part of the Great Compromise. A review of the proceedings of the Constitutional Convention of 1787 and of the Federalist papers reveals that one of the principle factors that enabled the Founding Fathers to reach agreement was the proposal and the acceptance of the idea that there would be included in the Constitution itself, as to be sharply distinguished from leaving the matter to the discretion of the Congress, a device under which the fundamental principle of representation based on population would be guaranteed by a constitutional requirement that the numbers of representatives would be periodically adjusted to meet the clearly anticipated changes in population that were bound to occur in the future.

Acceptance of the idea of a constitutionally required census clearly carried with it the rejection of qualifications of wealth or any other factor except population as established by Art. I, §2 in its original form.

Study of the debates and the other historical data suggests that except for the establishment of the constitutional protection of the census which contemplated that the constitutional principle of equal representation according to numbers would be maintained by periodic reapportionments, it is quite unlikely that the Great Compromise would have been adopted. The future of equal representation was not left to take care of itself; it was clearly intended by the

Founders that the Constitution itself would require that the principle of equal representation would be applied to all future changes in population as they would be periodically ascertained by the constitutionality required decennial census.

In **Wesberry v. Sanders**, supra, at 8, Mr. Justice Black took as his point of beginning the proposition that "The history of the Constitution, particularly that part of it relating to the adoption of Art. I, §2, reveals that those who framed the Constitution meant that, no matter what the mechanics of an election, whether state-wide or by districts, it was population which was to be the basis of the House of Representatives."

And on page 13 it was most significantly added that:

> The Constitution embodied Edmund Randolph's proposal for a periodic census to ensure 'fair representation of the people,' an idea endorsed by Mason as assuring that 'numbers of inhabitants' should always be the measure of representation in the House of Representatives. [376 U.S. at 13-14].

This appendix will detail the constitutional history compressed in that short summary as it relates to the decennial census. Most of the debate in the 1787 Convention on Art. I, §2 was concentrated in the month of July, 1787. Our page citations are to Volume III of Elliot's Debates (Jonathan Elliot ed. 1937).

The basic question of whether the Constitution or the Congress was going to control the apportionment of representatives was brought for the first time to the Convention on July 9, 1787 when Gouverneur Morris presented a committee report which fixed the House at 56 members and stated that "as the present situation of the states may probably alter, as well in point of wealth as in the number of their inhabitants, that the **legislature** be authorized from

time to time to augment the number of representatives" (288, emphasis ours). Mr. Gorham, with candor typical of the Convention, stated that unless the Congress had power to regulate its own apportionment "the Western States, who may have a different interest, might . . . by degrees outvote the Atlantic" (288). He advocated that power to apportion be left with the Congress so that "the Atlantic States, having the government in their own hands, may take care of their own interest, by dealing out the right of representation in safe proportions to the Western States" (288).

Mr. Randolph expressed his dislike of the report. "He was apprehensive that, as the number was not to be changed till the national legislature should please, a pretext would never be wanting to postpone alterations, and keep the power in the hands of those possessed of it" (289).

Randolph introduced the idea of a census on July 10, 1787. The debates report that:

> Mr. RANDOLPH [stated that] "it was in his contemplation, first, to make it the duty, instead of leaving it to the discretion, of the legislature, to regulate the representation by a periodical census; . . ." (291).

Randolph's idea of a constitutionally required census did not meet with immediate acceptance. Arguments and disagreement centered on the total size of the contemplated House; some wanted 65 members; a motion to double the number failed; and still another member wanted to cut 65 to 55. After a considerable amount of unproductive discussion, the debates, on page 293, show that:

> Mr. RANDOLPH moved, as an amendment to the report of the committee of five "that, in order to ascertain the alterations in the population and wealth of the several states, the legislature should be required to cause a census and estimate to be taken within one year after its first meeting; and every ____ years thereafter; and

that the legislature arrange the representation accordingly."

Gouverneur Morris, having the last say for that day, complained that the Randolph proposal would be "fettering the legislature too much" (293). He pointed to what to him was "the danger of throwing such a preponderance into the western scale . . . that, in time, the western people would out number the Atlantic States." Gouverneur Morris freely conceded that it was entirely possible that "if the legislature are left at liberty, they will never adjust the representation" (294).

On Wednesday, July 11, 1787, debate was resumed on Mr. Randolph's motion "requiring the legislature to take a periodic census, for the purpose of redressing the inequalities in the representation." Randolph's census proposal focused attention on the problem of how and when the people were to be fairly counted so that they could in fact be equally represented. The delegates began to realize that all their talk about how many votes the original states were to have and all their expressions of fear of what sort of representatives unknown and untested portions of present and future populations might elect had obscured the necessity of finding and establishing a basic and fundamental principle that would guarantee, as best one generation can ever guarantee for the next, that their experiment with representative government be given a fair chance to endure. The debates show that immediately after Gouverneur Morris, joined by Sherman, had protested about "shackling the legislature," the following occurred:

> Mr. MASON. The greater the difficulty we find in fixing a proper rule of representation, the more unwilling ought we to be to throw the task from ourselves on the general legislature. He did not object to the conjectural ratio which was to prevail in the outset; but considered a revision from time to time, according to

some permanent and precise standard, as essential to the fair representation required in the first branch. According to the present population of America, the northern part of it had a right to preponderate, and he could not deny it. But he wished it not to preponderate hereafter, when the reason no longer continued. From the nature of man, we may be sure that those who have power in their hands will not give it up, while they can retain it. On the contrary, we know that they will always, when they can, rather increase it. . . . **Unless some principle, therefore, which will do justice to them hereafter, shall be inserted in the Constitution, disagreeable as the declaration was to him, he must declare he could neither vote for the system here, nor support it in his state.** (294) (emphasis ours).

Mason answered the Gouverneur Morris' "danger to the Atlantic interests from new Western States" argument with a question: "Ought we to sacrifice what we know to be right in itself, lest it should prove favorable to states which are not yet in existence?" (295).

The debates show that Williamson joined Mason by stating that he was "for making it a duty of the legislature to do what was right and not leaving it at liberty to do or not to do it" (295). Randolph's response to Williamson's statement sounds almost like a quotation from a current Supreme Court apportionment case:

> If equality between great and small states be inadmissible, because in that case unequal numbers of constituents would be represented by equal numbers of votes, was it not equally inadmissible, that a larger and more populous district of America should hereafter have less representation than a smaller and less populous district? If a fair representation of the people be not secured, the injustice of the government will shake it to its foundations. What relates to suffrage is justly stated, by the celebrated Montesquieu, as a fundamental article in republican governments (295).

Randolph pointed out the reason why the census must be a national and not a state census. He said:

> The census must be taken under the direction of the general legislature. The states will be too much interested to take an impartial one for themselves (295).

Gouverneur Morris, apparently sensing a change of mood in the convention again protested that placing the idea of a census and reapportionment in the Constitution "fettered the legislature too much" (296). Sherman, who had theretofore supported Gouverneur Morris, changed his view of the matter. The Debates show that Sherman explained that while "he was at first for leaving the matter wholly to the discretion of the legislature; . . . he had been convinced by the observations of (Mr. Randolph and Mr. Mason), that the **periods** and the **rule** of revising the representation ought to be fixed by the constitution" (297). (both parenthesis and emphasis from the Debates).

The convention's shift from Gouverneur Morris' view after Sherman left him was rapid. The supporters of "unshackeled" and "unfettered" legislators never survived the following question:

> Mr. GORHAM. If the Convention, who are comparatively so little biased by local views, are so much perplexed, how can it be expected that the legislature hereafter, under the full bias of those views, will be able to settle a standard? (297).

Gorham added that he "was convinced, by the arguments of others and his own reflections, that the Convention ought to fix some standard or other" (297).

Gouverneur Morris fought to the end against any constitutional standard. He continued to reflect his fear of the men who would come from what he described as "the remote wilderness." "If the western people get the power into their hands," he cried, "they will ruin the Atlantic inter-

ests." He professed to be outraged at the apparent distrust being evidenced against the "fidelity" of legislators. He argued that if the legislators' "duty, their honor, and their oaths, will not bind them, let us not put into their hands our liberty, and all our other great interests; let us have no government at all" (298).

The debates show that James Madison immediately took the floor. The debates report that:

> Mr. MADISON was not a little surprised to hear this implicit confidence urged by a member who, on all occasions, had inculcated so strongly the political depravity of men, and the necessity of checking one vice and interest by opposing to them another vice and interest (298).

Madison added that:

> The truth was, that all men having power ought to be distrusted to a certain degree. . . . With regard to the Western States, he was clear and firm in opinion that no unfavorable distinctions were admissible, either in point of justice or policy (289-9).

Pinckney said, when the debate continued the next day, that he "foresaw that, if the revision of the census was left to the discretion of the legislature, it would never be carried into execution" and that he believed "the rule must be fixed, and the execution of it enforced by the Constitution" (302).

The debates show that on July 13, 1787:

> On the motion of Mr. RANDOLPH, the vote of Monday last, authorizing the legislature to adjust, from time to time, the representation upon the principles of wealth and numbers of inhabitants, was reconsidered by common consent, in order to strike out wealth, and adjust the resolution to that requiring periodical revisions according to the number of whites and three-fifths of the blacks (307-8) (Emphasis in the Debates.)

Randolph's motion passed with no opposing votes; Delaware, however, was recorded as divided. That action clearly reflects the view of the Convention that, to use Madison's words, "all men having power ought to be distrusted to a certain degree," and its determination that the duty to reapportion periodically in accordance with a constitutionally required census was a situation to which that principle was applicable.

The Federalist Papers show that when it came time to convince the people that the Constitution should be adopted, the idea that the census would insure that representation based on equal population would be periodically adjusted was emphasized as a fundamental reason why the Constitution should be adopted.

The original number of 65 for the original Congress was defended in Federalist No. 55 on the ground that the constitutionally required census would remedy any future malapportionment by the anticipated periodic reapportionments required by Art. I, §2. No. 55 stated:

> Within three years a census is to be taken, when the number may be augmented to one for every thirty thousand inhabitants; and within every successive period of ten years the census is to be renewed, and augmentations may continue to be made under the above limitation . . . the number of representatives will be augmented from time to time in the manner provided by the Constitution. On a contrary supposition, I should admit the objection to have very great weight indeed. (Putnams Sons, 1888 edition, p. 347).

Federalist No. 58 answered a charge that "the numbers of members [of the House of Representatives] will not be augmented from time to time, as the progress of population may demand." Madison conceded that if "well supported . . . this objection . . . would have great weight" (362). But, Madison stated:

> Those who urge the objection seem not to have recollected that the federal Constitution will not suffer . . . in the security provided for a gradual augmentation of the number of representatives. The number which is to prevail in the first instance is declared to be temporary. Its duration is limited to the short term of three years. **Within every successive term of ten years a census of inhabitants is to be repeated. The unequivocal objects of these regulations are, first, to readjust, from time to time, the apportionment of representatives to the number of inhabitants, under the single exception that each State shall have one representative at least;** secondly, to augment the number of representatives at the same periods, under the sole limitation that the whole number shall not exceed one for every thirty thousand inhabitants. (362) (emphasis ours).

Federalist No. 60 made perfectly clear that "an uncontrollable power over elections to the federal government could not, without hazard, be committed to the State legislatures" (373). With great insight and accurate foresight, No. 60 predicted that a particular states' representation in the national Congress would "generally be a faithful copy of the majorities [that prevail in the State Legislatures]" (377). History has taught the people of the United States the hard lesson that a malapportioned State legislature will almost inevitably produce a malapportioned Congressional delegation.

The constitutional history of Art. I, §2 would seem to make it apparent that the Founders included the decennial census in that section as a central instrument specifically designed to control and adjust the constitutionally required future apportionments of the House of Representatives. It would seem historically incongruous not to require the use of the constitutional decennial census in the establishment of congressional districts within the States. A rejection of the federal decennial census as the exclusive guideline for congressional districting would have grave and particular

significance in future congressional reapportionment cases. We therefore deem it appropriate to articulate some of the considerations that we believe must necessarily be taken into account in cases in which the problem will be in more precise focus than it is under the questions presented in this case.

It is our view that the constitutional requirement that a decennial census must be taken embodies a concept that is an integral part of the Great Compromise itself; it was designed to rectify and to protect against the foreseen probability of the injustice of future unremedied malapportionments. The Constitution therefore required that the census be a **federal** census and that it be a regular decennial census. The Founders explicitly recognized that the States were not to be relied upon in a matter in which their respective interests were so obviously apparent. The ten year period was designed to fix a period of relative stability during which all States were to be required to wait before asserting any claim for additional representation. And their claims were to be based on accurate population data collected by the federal government.

The idea of apportionment of representatives among the States based on the federal census and the notion that the districting within the States for election of federal representatives may be based on some sort of state census would seem to be basically inconsistent with the primary reason for the Founder's insistence that the constitutionally required decennial census be a **federal** census. The self-interest of at least sectors of particular States to manipulate their own local census figures would obviously have a drastic impact on the composition of the House of Representatives.

We are, of course, familiar with the fact that **Meeks v. Avery**, supra, without the benefit of Supreme Court guid-

ance, found that the Kansas legislature committed "no constitutional fault" when it used state census figures rather than federal. The recently reversed case of **Lucas v. Rhodes**, supra, indicated its agreement with that notion. Both cases cited **Burns v. Richardson**, 384 U.S. 73 (1966), the Hawaii state apportionment case. We believe that the Supreme Court's very careful statement in that case that use of voter registration figures satisfies "the Equal Protection Clause only because on this record it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis," was significantly limited to state apportionments and should not be indiscriminately read as the establishment of a principle applicable to congressional apportionment cases. We do not reach the precise question in **Preisler III** of whether any figures other than the federal decennial census may be used in support of a congressional districting plan, but we deem it appropriate to indicate our disagreement with the rationale of **Meeks v. Avery** and **Lucas v. Rhodes.**

Some have urged that legislatures and courts in the 1960's should wait until after the 1970 census before attempting compliance with the command of Art. I, §2 as construed in **Wesberry v. Sanders.** The argument runs that the 1960 census figures are so hopelessly out of date today that discrimination would result if those figures are used in a current redistricting plan. It seems to us that this is an argument that must be said to be foreclosed by the Constitution itself.

The idea that a mid-census apportionment plan may be discriminatory because of growth since the last decennial enumeration disregards the fact that the Constitution anticipated that only one redistricting would follow each decennial census. The ten year period of political stability anticipated by the Founders would be destroyed if population

data other than the decennial census should be looked to as the standard for ascertainment of population. For if the decennial census can be disregarded for the purpose of justifying variances that depart from the "as nearly equal as is practicable" standard of Art. I, §2, the population data other than the decennial census would logically be available for an attack on a plan initially valid but which, because of population shifts, developed substantial variances before the next decennial census was taken.

Those who wish to wait until after the 1970 census are, in effect, questioning the constitutional relevancy of the 1960 decennial census. But suppose that in 1971 the General Assembly of Missouri passes a congressional redistricting bill that is then in fact and law "as nearly equal as practicable"; and further suppose that current population trends of growth in urban areas continue through the 1970's. Is the constitutional relevancy of the 1970 census to be subjected to challenge before every congressional election during that decade? Must the legislature redistrict in 1973, 1975, 1977 and 1979 in order to account for current population trends? We think not. We think that the decennial census as a constitutional tool implicitly requires that the population changes inherent in its ten year mandatory period must be tolerated until the next decennial census in order to maitain the period of relative political stability contemplated by the Constitution.

We feel that the constitutional significance of the census should and must be maintained in congressional redistricting cases. The Supreme Court as yet has not directly considered the problem; and we need not, and therefore do not, reach the precise question discussed.

Dissenting Opinion of Honorable M. C. Matthes

MATTHES, J.

I respectfully dissent.

In my view the majority effectively but unwarrantedly sounds the death knell to the "de minimis" doctrine in the field of Congressional redistricting. If the majority opinion survives and becomes the law, no Congressional redistricting act enacted by the Missouri Legislature can withstand judicial scrutiny so long as that body could conceivably formulate a better plan which would mathematically redistrict the state with greater equality. In short, the majority rejects the Missouri plan despite the relatively minor variations in populations between districts because it does not approach their standards of perfection. Their position necessarily leads to the conclusion that only the courts can ultimately assume and properly complete the task of Congressional redistricting—a function primarily committed to the state legislatures. Even the courts, however, would be beset with difficulties in formulating court plans to comply with the unduly strict and unrealistic standards enunciated by the majority.

The "as nearly as is practicable" standard of **Wesberry v. Sanders**, 376 U.S. 1 (1964), or "the substantial equality of population" rule enunciated in **Reynolds v. Sims**, 377 U.S. 533 (1964), do not require the matematical exactness contemplated by the majority. The Supreme Court has fully realized the impossibility of drawing Congressional districts with "mathematical precision." **Wesberry v. Sanders**, supra, at 18. Attainment of the "as nearly as is practicable" standard has been relegated to the legislature, not to the judgment of an idealist divorced from the problems and pressures which beset the legislator. More recently in **Reynolds v. Sims**,

supra, a state reapportionment case involving a far greater population disparity between districts than is present here, the Supreme Court reiterated its view that "mathematical nicety is not a constitutional requisite":

> "We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement." 377 U.S. at 577.

Cf. **Roman v. Sincock**, 377 U.S. 695, 710 (1964).

In reaching the conclusion that the 1967 Act does not pass constitutional muster the majority proceeds to discard the "de minimis" principle on the rationale that if the legislature can at any point reapportion the state on a more equal basis, without doing violence to any articulated legally acceptable state policy, that doctrine has no applicability.

Although neither **Wesberry** nor **Reynolds** expressly incorporates the "de minimis" doctrine by name, its applicability in appropriate situations is implicit in both decisions. **Reynolds** plainly holds that "minor variations" based on legitimate considerations are permissible. 377 U.S. at 579.

In **Swann v. Adams**, 385 U.S. 440 (1967), on the other hand, Mr. Justice White stated for the majority:

> "De minimis deviations are unavoidable, but variations of 30% among the Senate districts and 40% among House districts can hardly be deemed de minimis and none of our cases suggests that differences of this magnitude will be approved without satisfactory explanation grounded on acceptable state policy." 385 U.S. at 444.

To me the quoted statement lends itself to the interpretation that if the variations are of a "de minimis" nature the

plan should be judicially approved.[1] No less an authority

[1] Consideration of various judicially drafted Congressional redistricting plans, which the Courts have formulated as the result of legislative inaction, reveals the difficulties inherent in attempting to achieve substantial equality in population in creating Congressional districts. In my view each of these court-created plans embodies the philosophy that the "de minimis" doctrine is applicable in reapportionment cases. In each instance a Three-Judge court adopted and approved a plan which included variations from the norm, without attempting to achieve a greater degree of equality between districts.

In *Baker v. Ellington*, Civil No. 3945, M.D. Tenn., July 13, 1967, the Court redistricted the State of Tennessee, which had a population of 3,567,089, into nine districts. Based on this figure the ideal population per district was 396,343. The Court-adopted plan provided for a difference in population of 16,728 between the largest and smallest Congressional district, or stated differently a maximum variation of 2.176% above the ideal district and 2.044% below.

In *Maryland Citizens Committee For Fair Cong. Redist. v. Tawes*, 253 F.Supp. 731, 733 (D. Md. 1966), *aff'd sub nom., Alton v. Tawes*, 384 U.S. 315 (1966), a Three-Judge district court, after holding unconstitutional the 1965 Maryland Congressional Redistricting Act, prescribed its own redistricting plan with a maximum deviation ratio of 1.026 to 1, or a difference of 9,973 between the population of the largest and smallest district.

Under another court-created redistricting plan, the State of Florida was divided into twelve Congressional districts, each consisting ideally of 412,630 persons. The largest district contained a population of 415,704 or .74% greater than the ideal district, while the smallest district contained a population of 407,677, a difference of 8,027, or 1.20% below the ideal. *Gong v. Kirk*, Civil No. 64-143, S.D. Fla., August 2, 1967.

A Three-Judge district court in *Montana* eliminated a previous disparity of 126,332 between that state's two Congressional districts by creating two new districts having a population of 327,019 and 347,701, respectively, or a variation of 20,682. *Roberts v. Babcock*, 246 F.Supp. 396 (D. Mont. 1965).

In Illinois a Three-Judge federal court in consultation with the state court divided the state into twenty-four Congressional districts. The plan was adopted despite the fact that the district having the least population (No. 16—394,481) deviated from the norm (420,048) by 6.1%, and the largest district (No. 8—451,527) by 7.5%. *People ex rel Scott v. Kerner*, 33 Ill.2d 460, 211 N.E.2d 736 (1965).

Lastly, in *Klahr v. Goddard*, 250 F.Supp. 537 (D. Ariz. 1966), a Three-Judge court apportioned Arizona's three Congressional districts on the basis of the 1960 census. The court's plan reshuffled various counties from one district to another to equalize the population disparity, but resulted nonetheless in a 61,244 variance in population between the First and Third districts.

than Judge Oliver has recognized the applicability of the doctrine in **Preisler II.** Speaking for the Court Judge Oliver stated:

> "Use of such words as 'feasible' and 'practicable' in a careful statement of the fundamental constitutional principle constitutes but a recognition that the familiar doctrine of de minimis is applicable and is designed to make clear that a State legislature would not be expected to create entirely new political subdivision lines in order to have absolute and precise mathematical equality in its congressional districts." 257 F.Supp. at 973.

Although the majority seems to disavow any reliance on the "de minimus" doctrine on the basis that only two Supreme Court [**Baker v. Carr**, 369 U.S. 186, 258 (1960) and **Swann v. Adams**, supra] and three lower court decisions have made specific reference to the phrase "de minimis", I believe its implicit recognition by the Supreme Court as well as other Three-Judge courts lies in their approval of redistricting acts which have contained a measurably greater degree of disparity between districts than does the Missouri Act. See **Connor v. Johnson**, infra.

The majority opinion in my view has been induced in large part by an erroneous concept of the extent to which the proponents of redistricting legislation must carry forward the burden of proof enunciated in **Swann v. Adams**, supra and **Kilgarlin v. Hill**, 386 U.S. 120 (1967). In **Swann v. Adams** the Supreme Court voided a state reapportionment plan consisting of variations of 30% and 40% among Senate and House districts "for the failure of the State to present or the District Court to articulate acceptable reasons for the variations among the populations of the various legislative districts with respect to both the Senate and House of Representatives." **Id.** at 443-44. In **Kilgarlin v. Hill**, the Supreme Court rejected an equally malapportioned plan for the reason that:

"Under that case [Swann v. Adams] it is quite clear that unless satisfactorily justified by the court or by the evidence of record, **population variances of the size and significance evident here** are sufficient to invalidate an apportionment plan. Without such justification, appellants' analysis of H. B. 195 made out a sufficient case under the Fourteenth Amendment." **Id.** at 122. (Emphasis supplied.)

My brethren have interpreted these foregoing pronouncements of the Supreme Court in a very narrow light. Their position appears to be that a redistricting scheme containing minor variations in population between districts cannot satisfy the one man, one vote concept, absent the presentation of acceptable proof for these variations. This theme is clearly manifested in their statement that "* * * the Constitution does not leave room for intentional 85%, 95%, or even 98% compliance with its mandate; Art. I, §2, commands equality of population in Congressional districts 'as nearly as practicable' and that any enacted plan that fails to comply with that constitutional standard, unless otherwise justified by substantial evidence in accordance with applicable law, is constitutionally void." I would agree that population variances between districts of the magnitude of those present in **Wesberry v. Sanders**, supra, and **Swann v. Adams**, supra, cannot stand absent a justifiable explanation of the reasons for such variations. I cannot, however, subscribe to the view that every unexplained, unjustified minor deviation from the ideal district renders the entire redistricting scheme constitutionally void. It seems utterly unrealistic to advocate that even a small variation of only 2% between the largest and smallest districts, absent justification, cannot survive constitutional attack. That, however, is precisely what the majority claims to be the law.

To consistently apply the majority rationale to Congressional redistricting schemes would require a legislature to

consider population alone as the sole, determinative standard for Congressional redistricting. Under such an approach a greater exactness in equality of population would necessarily and properly be required. The Supreme Court, however, has not renounced all considerations other than population equality in Congressional redistricting. I do not intimate that the "equal population principle" has been discarded or weakened. It is **the** essential element, but the Supreme Court has also averted to other factors as justifiable variations from a pure population standard, such as the "integrity of political subdivisions, the maintenance of compactness in legislative districts and the recognition of natural or historical boundary lines." **Swann v. Adams**, supra at 444; **Reynolds v. Sims**, supra at 578-79; **Cf. Wells v. Rockefeller**, 273 F.Supp. 984 (S.D. N.Y. 1967), **aff'd.** ____**U.S.**____(December 19, 1967); **Drum v. Seawell**, 250 F.Supp. 922, 924-25 (M.D. N.C. 1966).

Although various leaders of the Missouri Senate and House of Representatives testified unequivocally that population was the primary factor utilized in securing adoption of the Act, they did attest to the fact that legislature did take into account other permissive considerations, such as those policy considerations specified in **Reynolds** and **Swann**, in drafting the 1967 Act. This is not to suggest that the Missouri Legislature has justifiably articulated its reasons for the variances that do exist, but merely points out, I believe, some of the intangible considerations and pressures which confronted the Missouri General Assembly as well as other state legislatures, and discloses the futility of a legislative attempt to formulate districts of precise equality in populations.[2]

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[2] On page 5 the opinion states, in substance, that after defendants learned that the actual population variances were in many instances substantially greater than those appearing in defendants' motion, they advised the court of their desire to "adduce evidence to attempt to justify

the greater variations that had in fact been established." This does not comport with my knowledge and understanding of the pre-hearing proceedings. The Attorney General of Missouri advised Judge Oliver by letters dated October 11th and October 17, 1967 (copies to Judge Collinson and me) that he desired to produce witnesses at the hearing. The Attorney General did not state in either letter, or in any other communication within my knowledge that he would attempt to justify the greater variations. In view of my basic position, this matter is of no great significance. In fairness, however, to the Attorney General, my comprehension of what transpired should be recorded.

An analytical comparison of the various legislative redistricting plans that have been subjected to judicial scrutiny will aptly disclose that the variations in population under the 1967 Act are truly of a "de minimis" nature. In no case has either the Supreme Court or any other Three-Judge court held constitutionally void variations as minimal as those present in the Missouri Act. See Appendix I, infra. The following Table, based upon the population of Missouri as disclosed by the 1960 census, accurately portrays the result achieved by the Missouri Legislature in the 1967 Act.

District No.	Population	Percentage of Variation From Ideal
One	439,746	+ 1.8
Two	436,448	+ 1.03
Three	436,099	— .95
Four	419,721	— 2.84
Five	431,178	— .19
Six	422,238	— 2.26
Seven	436,769	+ 1.11
Eight	445,523	+ 3.13
Nine	428,223	— .87
Ten	423,868	— 1.88
Ideal population per district:		431,981
Average variation from Ideal:		1.6%
Ratio of largest to smallest district:		1.06 to 1
Number of districts above Ideal:		5
Number of districts below Ideal:		5
Number of districts within 1.88% of Ideal:		7
Population difference between largest and smallest districts:		25,802

By way of comparison, the 1961 Act voided in **Preisler I** created districts with an average variation of 8.47% from the ideal. In striking contrast to the 1967 Act the difference in population between the largest and smallest district was 128,355 or a disparity ratio of 1.339 to 1. The 1965 Act declared unconstitutional in **Preisler II** produced Congressional districts with an average variation of 6.54% from the ideal district. The disparity ratio of the largest to smallest district was 1.218 to 1 or a population spread of 85,015.

What is the practical effect of these maximum variations? Simply stated, a Congressman from the Eighth District (the largest) would represent 25,802 more constituents than his counterpart from the Fourth District (the smallest). Considering the fact that each Congressman would represent 431,981 persons if the state could be divided on an exactly equal population basis, I have difficulty in comprehending how the residents of the Eighth District would, for practical purposes, be appreciably deprived of substantially equal representation in Congress. Certainly the 6% variation in the Missouri plan is a far cry from the 430,368 population spread between districts found in **Wesberry**, or the approximately 30% to 40% population variations in **Swann, Kilgarlin, Lucas v. Rhodes**, Civil No. 65-264, N.D. Ohio____ ____, 1967, **rev'd per curiam**, ____U.S.____ (1967; and the large variations in **Wells v. Rockefeller**, supra.

The Mississippi Case. Despite the herculean efforts of my brothers to sweep **Connor v. Johnson**, 386 U.S. 483 (1967), under the rug as wholly irrelevant to the case before us, (see Appendix C of the majority opinion) I strongly believe that **Connor** supports my conclusion that the Missouri Act is constitutional, and that the variations therein can only be considered "de minimus" in nature. I do not propose to engage in a lengthy battle of words over the underlying reason for the Supreme Court's summary affirmance of the

district court's decision validating the 1966 Mississippi Redistricting Act. The fact is, as revealed by the district court's opinion, **Connor v. Johnson**, Civil No. 3830, S.D. Miss., September 28, 1966, the variance in population among the Congressional districts was an issue before the court. The jurisdictional statement, considered in context, discloses that this same issue was before the Supreme Court.[3] Even though the appellants in **Connor** did not squarely present the case before the Supreme Court in terms of an Article I, §2 issue, I submit that the Supreme Court was concerned with the substance of all facets of the Mississippi Act, and would have unhesitatingly reversed if the variations in populations violated its one man, one vote concept as enunciated in prior cases.

Inasmuch as the defference in population between the largest and smallest districts in Mississippi is 26,265, as compared to 25,802 under the Missouri Act, or a disparity ratio of 1.062 to 1, I am driven to the conclusion that **Connor** is impelling authority for approval of the Act before us.[4]

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[3] "Nor does the legislature's adopted plan conform to standards of population equality when compared to the available alternatives. The difference between the largest and the smallest district under the plan adopted is 28,061; the same figure for the Revised Delta Plan is 13,672, less than half. The greatest deviation from the norm in the adopted plan is 15,332; in the Revised Delta Plan, it is 7,572. The average deviation of all five districts in the adopted plan is 11,547; in the Revised Delta Plan, it is 3,767. Clearly, the desire to achieve mathematical population equality was not decisive for the Mississippi legislature in its choice of plans." P. 8, appellants' jurisdictional statement filed in the Supreme Court.

[4] *Toombs v. Fortson*, 241 F.Supp. 65 (N.D. Georgia, 1965) affirmed without opinion, 384 U.S. 210, teaches that a departure figure of 15% is permissible. I am mindful that *Toombs* involved reapportionment of the Georgia General Assembly. This does not dilute the strength of the pronouncement of the *Toombs* court. The Supreme Court has held, by implication if not expressly, that the standards for testing the validity of a state apportionment plan are applicable in determining whether a Congressional redistricting scheme satisfies the mandate of the Constitution. *Huddleston v. Grills*, 385 U.S. 455 (1967); *Wells v. Rockefeller*, supra, *aff'd sub nom., Rockefeller v. Wells*, _____U.S._____ (Dec. 19, 1967).

In view of the strictness of their holding the majority has unwarrantedly given great emphasis to the failure of the General Assembly to use population figures that accurately reflected the 1960 census. I need not recount in detail the testimony of Senator Avery, who sponsored the 1967 Act in the General Assembly, in regard to the legislature's misguided source of information. That testimony does reveal, however, that the sources of the inaccurate population data were in part the various Election Boards in the City of St. Louis, St. Louis County, and Jackson County, which encompasses the Kansas City area. I am completely satisfied from my reading of the record that the sponsors of the 1967 Act clearly labored under the misguided impression that the sources of the inaccurate figures were reliable. Despite the inaccuracies, however, both parties stipulated that this Court should determine the validity of the 1967 Act on the basis of the 1960 census population. The difference, moreover, between the correct and incorrect figures for the entire state amounted to a negligible 1,280.

This case should be decided on the basis of what was in fact achieved by the Missouri General Assembly in light of the correct population figures. To me, the crucial question is not whether a better plan might have been adopted if the correct figures were used, but rather whether the variations in population created by the 1967 Act, based on accurate population figures, offend the principle of substantially equal representation.

Under the rigid formula promulgated by the majority, I am satisfied that any reapportionment scheme which might have resulted on the basis of the correct population figures, would similarly have been destined to judicial condemnation.

The underlying rationale of the majority is very disturbing to me. Careful analysis of their opinion will permit only one conclusion—that if in the judgment of the court, not the

legislature, a plan providing for greater equality in representation can be formulated, the legislative plan must fail. Appendices A and B attest to this conclusion. In those appendices the court has engaged in a game of "redistricting checkers" by shifting counties and townships from one district to another in order to demonstrate how smaller deviations could have been reached. This reasoning runs counter to my conception of the law.

Whether the 1967 Act is constitutionally permissible should not be tested by the results that could be achieved by the use of a "mindless computer" or by the efforts of a group that is completely detached from the duties, responsibilities and perplexing problems of duly elected legislators. Obviously the Seventy-Fourth General Assembly did not achieve mathematical perfection in the distribution of Missouri's overall population. The problem of population disparities, however, cannot be reconciled solely in terms of a mechanical test of shifting counties until the judicial ideal is met. **If every apportionment Act must be cast aside because a reviewing court could devise a scheme for more equal representation, I believe it is high time that the Supreme Court, in no uncertain language, promulgates such a standard.** See dissenting opinion of Mr. Justice Harlan in **Rockefeller v. Wells, supra.**

I would hold that the 1967 Act conforms to the mandate of the Constitution.

APPENDIX I

A—Cases Held Unconstitutional. *Affirmed by Supreme Court
**Court Plan Subsequently Adopted

STATE	CASE	Population Difference Between Largest and Smallest Districts	Ratio of Largest to Smallest District
** ARIZONA	Klahr v. Goddard 250 F. Supp. 537	465,274	
ARKANSAS	[illegible] Faubus 238 F. Supp. 62	242,541	1.73 to 1
** FLORIDA	Gong v. Kirk (Unreported)	90,495	
** MARYLAND*	Maryland Citizens Comm., etc. v. Tawes 253 F. Supp. 731	113,505	1.34 to 1
MASSACHUSETTS	Dinis v. Volpe 264 F. Supp. 425	102,626	1.27 to 1
MICHIGAN	Calkins v. Hare 228 F. Supp. 824	188,084	1.6 to 1
NEW YORK	Wells v. Rockefeller 273 F. Supp. 984	120,366	
NEBRASKA	Exon v. Tiemann ___F. Supp.___ (1967)	126,403	1.312 to 1
NEW JERSEY	Jones v. Falcey 222 A. 2d 101	64,760	

APPENDIX I (Cont.)

A—Cases Held Unconstitutional. *Affirmed by Supreme Court
**Court Plan Subsequently Adopted

STATE	CASE	Population Difference Between Largest and Smallest Districts	Ratio of Largest to Smallest District
** TENNESSEE	Baker v. Clement 247 F. Supp. 886	111,830	1.32 to 1
VIRGINIA	Wilkins v. Davis 139 S.E.2d 849	214,206	1.68 to 1

B—Held Constitutional *Reversed by Supreme Court.
**Affirmed by Supreme Court

ALABAMA	Moore v. Moore 246 F. Supp. 578	54,505	1.14 to 1
ILLINOIS	Kirby v. Illinois 251 F. Supp. 906	57,046	
INDIANA	Grills v. Branigan 255 F. Supp. 155	84,545	1.2 to 1
KANSAS	Meeks v. Avery 251 F. Supp. 245	15,060	1.03521 to 1
** MISSISSIPPI	Connor v. Johnson (Unreported)	26,265	1.062 to 1

Comments of Honorable William R. Collinson in Clarification of His Concurrence

WILLIAM R. COLLINSON, District Judge:

I deem it appropriate to add a word to my joinder in the majority opinion in light of the construction that my Brother Matthes suggests might be placed on the opinion of the Court.

No one can believe or contend that the Supreme Court has said that the "one-man one-vote" doctrine requires that Congressional districts be exactly equal in population; certainly the majority opinion does not so state. But neither has the Supreme Court said that there is a mathematical formula for inequality (within a certain percentage) which will satisfy the "nearly equal as practicable" rule.

It seems obvious that existing voting units, within which the votes are cast, counted, and tallied, are the building blocks from which congressional districts are constructed. It seems equally obvious that since these units vary considerably in population, exact mathematical equality cannot be attained without changing the size of the building blocks. None of the cases requires this. All that the cases require is that the State legislature adopt "a rational policy" as to the units to be used, and then the variations which will result from the use of existing political boundaries are justifiable.

The apparent, although undeclared, policy as to the existing political boundaries in the 1967 Act now before the Court was to use precinct (in the city and metropolitan counties) as the proper units for those metropolitan areas, and to use the county as the unit in the remainder of the State.

If the population variations which exist in the 1967 Act resulted from the preservation of existing political boundaries under that plan, I would have no quarrel with it.

But the variations in this Act do not result from any attempted preservation of boundaries. The largest variations result from failure to remove entire counties from their old district and place them in an adjoining district. For example, if Dent County were taken from the 8th District (+ 13,542) and placed in the 10th (−8,113), the 8th would then be only + 3,097 and the 10th would be + 2,332. A similar shift could be made of Hickory County from the 7th District to the 4th District. The three St. Louis districts are over 16,000 long, but the adjacent 9th is 3,750 short and the 6th next to it is 9,750 short.

I do not condemn the 1967 Act because there were more equal plans defeated in the Legislature; nor do I condemn it because it divides St. Louis County between a number of districts. I believe the plan is unconstitutional because on its face and under the undisputed evidence it is not an attempt to divide the State of Missouri in Congressional districts that are as nearly equal in population as is practicable. And this for the reason that it is obvious that entire counties can be moved to adjoining districts with a resulting substantial decrease in the variances of population in the present Act and because there is no evidence in this record that can be said to explain or justify why this was not done.

In short, the proponents of the 1967 Act have failed to carry the burden of proof imposed on them by law.

Order of Lower Court Granting Conditional Stay

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI,

CENTRAL DIVISION

PAUL W. PREISLER, et al.,
Plaintiffs,
vs.
THE SECRETARY OF STATE OF MISSOURI and THE ATTORNEY GENERAL OF MISSOURI,
Defendants.
F. V. HEINKEL, et al.,
Intervenor-Defendants.

No. 1064

MEMORANDUM AND ORDER ON PENDING MOTIONS TO STAY.

On January 12, 1968 defendants filed a motion to stay this Court's order, judgment and decree of December 29, 1967, pending appeal. Intervenors filed a similar motion requesting different relief on January 22, 1968. Notices of appeal were filed by each party simultaneously with their motions. The prayers of the pending motions are different and must be treated separately. Defendants' motion prays for a stay "pending final disposition of the appeal herein to the Supreme Court of the United States." Intervenors pray for a stay, however, "until after the 1968 Congressional elections, November 4, 1968." An order to stay can only be entered with the concurrence of all three judges.

I.

We deal first with Intervenors' motion. In substance, we all agree that the relief prayed for in that motion should not

be granted. The granting of the specific relief prayed for would necessarily mean that the 1968 Congressional elections in Missouri would be held under the 1967 Act held to be unconstitutional by this Court on December 29, 1967.

In Preisler II we authorized the conduct of Missouri's 1966 congressional election under the constitutionally void 1965 Act for reasons fully stated in that opinion. We are not disposed to authorize the conduct of Missouri's 1968 congressional elections under the 1967 Act that we have held to be constitutionally void. Our refusal to do so is in accordance with the precedent established by the Maryland three-judge court in **Maryland Citizens Committee for Fair Cong. Redist. v. Tawes**, Md. 1966, 253 F.Supp. 731, affirmed by the Supreme Court in **Alton v. Tawes**, 384 U.S. 315 (1966).

In denying the relief prayed for by Intervenors we follow the Maryland three-judge court which held:

> We have already allowed the 1964 election to be conducted on the basis of a districting law found to be unconstitutional. Even if disposed to permit another election upon the basis of a void statute, we should not do so because this would offend the rule of the Supreme Court in **Swann v. Adams**, 86 S.Ct. 767 (Feb. 25, 1966). There the Supreme Court, in a reapportionment case, summarily reversed the action of a three-judge district court in Florida in permitting as a temporary measure the use of a law held invalid. We have already exercised such tolerance in our 1964 stay order; we do not feel free to do so again. [Supra, at 734].

Accordingly, the specific relief prayed for in Intervenors' motion for a stay therefore should be and will be denied.

II.

Defendants' prayer is for a present stay "pending final disposition of the appeal herein to the Supreme Court of the United States." All judges are agreed that a stay should be

granted. While we agree with Judge Matthes, we believe that our stay should be conditioned as hereinafter stated.

It appears from the defendants' application that the Attorney General of Missouri believes that the April 30th deadline for congressional filings will pass before a Supreme Court ruling, and that a stay is necessary to allow an orderly election under the 1967 Act. But in the past the Supreme Court has consistently ruled on congressional redistricting cases in election years within a few weeks after such cases were docketed in that court.

We noted in **Preisler II** that the Supreme Court of the United States had acted with great dispatch in the Maryland and the North Carolina congressional apportionment cases in the election year of 1966. The Maryland three-judge court established the Maryland districts by court order on May 3, 1966. The Supreme Court affirmed on the merits in **Alton v. Tawes**, supra, on May 31, 1966. The North Carolina three-judge court's order declaring the 1965 North Carolina Act void became final on March 8, 1966. The Supreme Court affirmed on the merits in **Drum v. Seawell**, 383 U.S. 831 (1966) on April 4, 1966.

The congressional redistricting cases decided by the Supreme Court in this election year of 1968 show the same pattern of prompt disposition as that reflected by the Maryland and North Carolina cases in 1966. In our opinion of December 29, 1967 we noted that appeals were then pending in the Supreme Court from an order of the three-judge Massachusetts court in **Dinis v. Volpe**, and from an order of the three-judge Florida court in **Gong v. Kirk**.

The Florida and Massachusetts appeals were docketed in the Supreme Court on December 2, 1967 and December 4, 1967, respectively, 36 L.W. 3273. The Supreme Court unanimously affirmed both cases by summary action on January 16, 1968, 36 L.W. 3285.

Neither the defendants nor the intervenors have yet docketed their respective appeals in the Supreme Court. The full record in this case is ready to be transmitted to the Clerk of the Supreme Court of the United States by the Clerk of this Court on the same day that defendants or intervenors request and direct that such transmittal be made. The appeals that have been noticed in this Court can be docketed in the Supreme Court just as soon as the defendants and intervenors prepare and file their jurisdictional statements required by the Rules of the Supreme Court. The appeals that have been noticed can be perfected by the Attorney General and Intervenors immediately, and it is most probable that a decision will be handed down within a very short time.

If a summary ruling reverses this Court's decision, the election will be held under the 1967 Act; if the decision is affirmed, the Legislature or this Court must establish constitutional districts for the 1968 election. The third possibility is that the Supreme Court will direct that briefs be filed and set the case for oral argument. In that event, the Supreme Court will undoubtedly issue its own stay order and direct how the 1968 election shall be conducted in Missouri.

The only portion of our order of December 29, 1967 upon which a present stay could be said to operate is that portion which prohibits any further filings of congressional candidates under the void 1967 Act. If a stay should be granted by this Court at the present time many candidates might file in the districts that this Court has held to be constitutionally void. We do not know why the Attorney General seeks the relief prayed for in his motion; nor is that matter one of concern to this Court. Candidates for the Congress must determine for themselves whether they wish to file from the 1967 districts held to be void and begin campaigning from those districts or whether they will await further developments in the Special Session and in the Supreme Court.

Except for its effect on the candidates for Congress, it appears of little importance whether this Court issues a stay order, but, on the remote possibility that after the appeal is docketed the Supreme Court would take no action until after the statutory deadline for filing by congressional candidates, we are all agreed that a stay order be issued until final disposition of this appeal by the Supreme Court.

III.

The Attorney General has indicated that he desires that all possible delay be avoided. In order to make certain that such be the case, we join in Judge Matthes' order but also add the condition that such stay be effective for a period of fifteen days and shall be further automatically extended if within that period Defendants and Intervenors shall have docketed their respective appeals in the Supreme Court.

For the reasons stated, it is

ORDERED that the specific relief prayed for in Intervenor-Defendants' pending motion to stay "until after the 1968 Congressional elections, November 4, 1968" should be and is hereby denied provided, however, that the same stay granted defendants shall be granted Intervenor-Defendants as provided in the next paragraph of this order. It is further

ORDERED that Defendants' pending motion to stay should be and is hereby granted until February 14, 1968, provided, however, that should Defendants or Intervenor-Defendants docket their respective appeals in the Supreme Court of the United States on or before that date, then said stay shall be effective pending final disposition of such appeals in the Supreme Court.

John W. Oliver, District Judge
William R. Collinson, District Judge

Kansas City, Missouri
January 30, 1968

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI,

CENTRAL DIVISION

PAUL W. PREISLER, et al.,
Plaintiffs,

vs.

THE SECRETARY OF STATE OF MISSOURI and THE ATTORNEY GENERAL OF MISSOURI,
Defendants,

and

F. V. HEINKEL, R. J. ROSIER, W. W. BECKETT, A. D. SAPPINGTON, L. O. WALLIS, MILLER HERN, HERMAN HETLAGE, HERMAN KERTZ, TURPIN YOUTSEY and GLEN MYERS,
Intervenor-Defendants.

No. 1064

ORDER TO STAY JUDGMENT AND DECREE.

On December 29, 1967 this Court entered its judgment and decree declaring the 1967 Missouri Congressional Redistricting Act unconstitutional.

On Jauary 12, 1968 defendants filed in this Court a notice of appeal to the Supreme Court of the United States, and on the same date filed a motion to stay the judgment and decree pending final disposition of the appeal in the Supreme Court of the United States.

Upon due consideration of the motion and the suggestions filed in support thereof and in opposition thereto the Court finds that the motion to stay should be and hereby is granted.

Accordingly, the judgment and decree entered on December 29, 1967 is hereby stayed until final disposition of the defendants' appeal in the Supreme Court.

Dated January 1968.

M. C. Matthes
United States Circuit Judge.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI,

CENTRAL DIVISION

PAUL W. PREISLER, et al.,
Plaintiffs,

vs.

THE SECRETARY OF STATE OF MISSOURI and THE ATTORNEY GENERAL OF MISSOURI,
Defendants,

and

F. V. HEINKEL, R. J. ROSIER, W. W. BECKETT, A. D. SAPPINGTON, L. O. WALLIS, MILLER HERN, HERMAN HETLAGE, HERMAN KERTZ, TURPIN YOUTSEY and GLEN MYERS,
Intervenor-Defendants.

No. 1064

ORDER STAYING JUDGMENT AND DECREE.

Upon due consideration of the motion of the intervenors to "stay order, judgment and decree pending appeal", it is ordered that the judgment and decree entered on December 29, 1967 be and the same is hereby stayed pending disposition of intrvenors' appeal in the Supreme Court.
Dated January 1968.

M. C. Matthes
United States Circuit Judge.

1967 Missouri Congressional Redistricting Act

(Chap. 128, Mo. Rev. Stats., Cum. Supp. 1967, pp. 374-375)

[TRULY AGREED TO AND FINALLY PASSED]

HOUSE SUBSTITUTE FOR
SENATE COMMITTEE SUBSTITUTE FOR

SENATE BILL NO. 182

74TH GENERAL ASSEMBLY

AN ACT

To repeal sections 128.202, 128.212, 128.222, 128.232, 128.242, 128.252, 128.262, 128.272, 128.282, 128.292 and 128.302, RSMo 1965 Supp., relating to congressional districts and to enact in lieu thereof eleven new sections relating to the same subject.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. Sections 128.202, 128.212, 128.222, 128.232, 128.242, 128.252, 128.262, 128.272, 128.282, 128.292 and 128.302, RSMo Supp. 1965, are repealed and eleven new sections enacted in lieu thereof, to be known as sections 128.203, 128.213, 128.223, 128.233, 128.243, 128.253, 128.263, 128.273, 128.283, 128.293 and 128.303, to read as follows:

128.203. The state of Missouri is hereby divided into ten congressional districts, the legal voters of each district to elect one member of Congress of the United States.

128.213. The first district shall be composed of the following wards in the city of St. Louis: 1, 2, 3, 4, 18, 19, 20, 21, 22, 25, 26, and 27, of precincts 3 through 18 of ward 5; and of Washington township and St. Ferdinand township in St. Louis county.

128.223. The second district shall be composed of the following townships in St. Louis County: Airport, Clayton,

Creve Coeur, Ferguson, Gravois, Hadley, Jefferson, Lincoln, Midland, and Normandy, and the following precincts of Bonhomme Townships 1, 2, 3, 6, 7, 8, 19, 41, 48, 59, 77, 89, 90, 91, 93.

128.233. The third district shall be composed of the following wards in the city of St. Louis: 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 23, 24, and 28, of precincts 1, 2, 19 and 20 of ward 5; and of Lemay township in St. Louis County.

128.243. The fourth district shall be composed of the following wards in the city of Kansas City: Wards 15 and 24; and the following townships in Jackson County, it wit: Washington, Blue, Brooking, Fort Osage, Van Buren, Prairie and Sni-A-Bar; and the following counties: Cass, Bates, Vernon, St. Clair, Henry, Johnson, Lafayette, Saline, Barton, Benton and Pettis.

128.253. The fifth district shall be composed of the following wards in the city of Kansas City: Wards 1 through 14, inclusive; 16 through 20, inclusive; and Wards 22, 23 and 25.

128.263. The sixth district shall be composed of the following counties: Atchison, Holt, Nodaway, Andrew, Buchanan, Platte, Worth, Gentry, DeKalb, Clinton, Clay, Harrison, Daviess, Caldwell, Mercer, Grundy, Livingston, Linn, Ray, Putnam, Sullivan, Chariton and Carroll.

128.273. The seventh district shall be composed of the following counties: Laclede, Jasper, Newton, McDonald, Cedar, Dade, Lawrence, Barry, Camden, Hickory, Polk, Greene, Christian, Stone, Taney, Dallas, Webster, Wright, Douglas and Ozark.

128.283. The eighth district shall be composed of the following counties: Cooper, Morgan, Moniteau, Miller, Cole, Maries, Pulaski, Phelps, Texas, Dent, Crawford, Washington, Boone, Howard and Jefferson; and the following townships in St. Louis County: Concord and Meramec, and all of

Bonhomme except precincts 1, 2, 3, 6, 7, 8, 19, 41, 48, 59, 77, 89, 90, 91 and 93.

128.293. The ninth district shall be composed of the following counties: Macon, Adair, Schuyler, Scotland, Clark, Knox, Lewis, Shelby, Marion, Randolph, Monroe, Ralls, Audrain, Pike, Callaway, Osage, Montgomery, Lincoln, Warren, Gasconade, Franklin and St. Charles; and the following townships in St. Louis County: Spanish Lake and Florissant.

128.303. The tenth district shall be composed of the following counties: Howell, Shannon, Reynolds, Iron, St. Francois, Ste. Genevieve, Perry, Cape Girardeau, Madison, Wayne, Carter, Oregon, Ripley, Butler, Bollinger, Stoddard, Scott, Mississipip, New Madrid, Pemiscot and Dunklin.

FOOTNOTES

1. (Page 4)

It is apparent, however, that the substantial errors in Defendants' Appendix B made the allocation of the population of both of Missouri's metropolitan areas look better than the facts as established by the actual census figures. The mistakes made in regard to the population supposedly allocated to what are essentially rural districts are even more obvious. Defendants' Appendix B indicated that there were 3,000 more people in the rural Sixth District than the census shows are actually there; in the Eighth District, in which the 1960 census figures establish an actual population of 445,523, Defendants' Appendix B reflected a supposed population of only 439,984. When the question of justification of variances is reached, an obviously different question is presented in a case involving an alleged variance of + 8,003 than is presented in a case involving an undisputed variance of + 13,542.

1a. (Page 4)

Footnote 2 on page 6 of the dissenting opinion suggests that we were unfair to the Attorney General. We believe that the Attorney General's letters of October 11 and 17, 1967 referred to in that footnote cannot properly be read out of context but must be read in light of the pre-hearing proceedings revealed by the transcript of the September 26, 1967 conference. **Swann v. Adams III** was the subject of full discussion at that conference (September 26, 1967 transcript, pp. 32-34). It was there made clear that discussion of that and other cases was not to be considered by the Attorney General "as an invitation to either refrain from adducing evidence or to adduce evidence" (Ibid, p. 35). At that stage of this case, and at a time when the Attorney General's office did not have information concerning the accuracy of the figures presented in Appendix B, the defendants' sole legal contention was that "the variations are within the doctrine of **de minimis**" (Ibid, p. 34). At the close of the September 26, 1967 conference, the Assistant Attorney General stated:

> MR. DOWNEY: Judge, I think it is clear from what you have said that although our motion is founded entirely on the theory that the present congressional districts fall within a **de minimis** doctrine, that **the issue of the justification variations by factors incident to a rational State policy are inherent in this case**, in the event that the Court should find that the districts do not fall within the doctrine of **de minimis**; and as I have told the Court, **I do not anticipate at this time that production of evidence on the issue of rational State policy to explain the variations**; but when October 9 comes around, when we have had an opportunity to give this mat-

ter further consideration we may reach a position to adduce evidence. (Emphasis ours, Ibid, p. 36).

The Assistant Attorney General was advised at the September 26, 1967 conference that leave would be granted and full opportunity would be afforded to permit him "to put an alternative string in your bow that . . . there are legally justified reasons to explain the disparities as we finally determine what they may be" (Ibid. p. 37).

As state in the text, after defendants learned that the actual population variances were greater than those set forth in defendants' pending motion, they advised the Court that defendants would like to adduce evidence. The letters of October 11 and 17, 1967 were written pursuant to the time table established at the pretrial conference (Ibid, pp. 21-29). Those letters did not need to and did not in fact reiterate that the Attorney General had elected to introduce evidence on the "issue of justification," also described at the September 26, 1967 conference as "the issue of rational State policy to explain the variations" about which the Attorney General had changed his mind between September 26, 1967 and October 9, 1967, when the stipulation of fact established what variations were actually involved. We believe that judgment as to whether the Attorney General was fairly or unfairly treated by the sentence in the text must be made by consideration of all and not isolated parts of the record.

2. (Page 5)

Stipulation Exhibits 16, 18, 20, 23, 25 and 27, and the deposition testimony of the Chairman of the Senate Reapportionment Committee establish that accurate 1960 census figures in fact were made available to the 1967 Missouri Legislature by election officials in the St. Louis and Kansas City metropolitan areas and by the Bureau of the Census. The House Majority leader, however, identified a map of Missouri used by him on which certain population figures had been written in long hand with red ink. That witness testified that the blue ink figures on that exhibit, reflecting an unexplained shift of 5,000 population from District 1 to District 3 in the St. Louis metropolitan area, were in his hand writing. The Chairman of the Senate Reapportionment Committee testified that he had used a similar map. He testified that the longhand red ink figures on his map had been copied from the longhand figures that appeared on the House Majority Leader's map. The composite of these longhand figures, the source of which is still unexplained, eventually appeared on Appendix B attached to defendants' pending motion.

Interestingly enough, the Senate Chairman volunteered that he had used his map in connection with each of the 1961, 1965, and 1967 Acts and that he had but recently noticed that Dade

County's 1960 census population of 7,577 had always incorrectly appeared on his map as 12,647. That error of long standing did not affect defendants' Appendix B because the population there reported for District 7, in which Dade County was located, was one of the two districts for which the 1960 census figures were accurately stated. The explanation for that phenomenon does not appear of record.

Addendum to Footnote 2:

On page 9-10 of his dissenting opinion Judge Matthes states, contrary to the finding of the majority opinion, that "inaccurate population data" were furnished the Legislature by "the various Election Boards in the City of St. Louis, St. Louis County, and Jackson County, which encompasses the Kansas City area." That finding is used as a base for the further finding that "the sponsors of the 1967 Act clearly labored under the misguided impression that the sources of the inaccurate figures were reliable."

As we have stated, we checked the accuracy of the data furnished by the election officials against the stipulated population data from the Bureau of the Census and found it to be accurate.

To state that the Legislature had but did not use accurate 1960 federal census figures is not to question the good faith of any member of the Missouri Legislature. That fact, it seems to us, forecloses that any public official other than the members of the Legislature can be charged with responsibility for the casual manner in which the important task of congressional apportionment was in fact approached by the 1967 General Assembly.

3. (Page 7)

In spite of the fact that we expressly rejected defendants' political compromise arguments in **Preisler II** (see footnote 7 and 20, and accompanying text on pages 968 and 980 of 257 F.Supp.) defendants and intervenors again contend that the 74th Missouri General Assembly produced the best possible bill that politics would permit. Defendants point to the fact that the "Majority and Minority Leaders of both Houses of the Missouri Legislature have testified that the 1967 Act is a reasonable legislative compromise." Intervenors again contend that "the 1967 Act is a reasonable legislative compromise and in fact the best that could be obtained as a practical matter." In reflective moments, we have pondered what response would be given by members of the General Assembly to an effort that would attempt to justify a refusal to enforce a law enacted by that legislative body on the ground that it was politically inexpedient, as a matter of practical politics, for the offender to have complied with such a law.

4. (Page 7)

The full significance of the Supreme Court's affirmance of **Preisler II** and vacation of **Grills v. Branigin's** judgment must be assayed in light of **Preisler II's** express refusal to follow the rationale of "**Grills v. Branigin** and that of still earlier cases, both federal and State, that attempted to apply standards other than those set forth in Art. I, §2 of the Constitution as construed by **Wesberry v. Sanders**, to a congressional reapportionment case. The cases in addition to **Grills v. Branigin** that this court expressly refused to follow in **Preisler II** were **Bush v. Martin II**, S.D. Tex. 1966, 251 F.Supp. 484, **Moore v. Moore**, S.D. Ala. 1965, 246 F.Supp. 578; **Kirby v. Illinois State Electoral Board**, N.D. Ill. 1965, 251 F.Supp. 908, **People ex rel. Scott v. Kerner**, 33 Ill. 2d 460, 211 N.E.2d 736 (1965); and **Levitt v. Maynard**, 105 N.H. 447, 202 A.2d 478 (1964).

5. (Page 8)

Mr. Justice Harlan has consistently and unsuccessfully advocated the view that the rules formerly applicable to judicial review of apportionment cases should still be the law. A good example of how the old rules were applied is illustrated by the judicial treatment given Missouri's constitutional command that Missouri's congressional districts "shall be composed of contiguous territory as compact and as nearly equal in population as may be." Art. 3, Section 45, 1945 Missouri Constitution.

When Mr. Phillips, delegate from St. Louis, proposed that constitutional provision to the 1945 Missouri Constitutional Convention, he stated:

> MR. PHILLIPS (of St. Louis City): . . .
> Mr. President, this Section is also Section 55 of the Constitution of the State of Virginia. It has been in the Virginia Constitution for over one hundred years and a great many of our redistricting statutes are exact copies of this language. Now, under the Constitution of the United States, Congress has the power to fix the times and places of holding elections for representatives, that is the State Legislature has that power and but Congress can alter these regulations. In 1911 Congress passed an act prescribing how the representative districts shall be made, but that act expired on the passage of the Act of June 18, 1929, which leaves no federal statute prescribing the manner in which state legislatures shall lay out the congressional districts. In the State of Illinois, the Legislature of Illinois made a horrible gerrymander. I have forgotten the exact facts, but I think one district had two or three times the population of the others and the Supreme Court of Illinois said that while they regretted the fact that they could not do anything about it,
> . . .

they did say that it was a terrible redistricting and that if they only had the power they would set it aside, but under the Act of Congress, why the Legislature, I mean under the Constitution of the Uunited States, why the Legislature was free to do as it saw fit.

Now, on the other hand, the same thing happened in the State of Virginia. The Legislature of Virginia made a horrible gerrymander of the congressional districts and the Supreme Court of Virginia held that by reason of this provision in the Virginia Constitution, they were bound by the thing because Congress had enacted no law on the subject.

Now, Missouri has been a shining example of gerrymander of representative districts for years and years and if we will put a thing like this in our Constitution, it will protect the people of our state against such a thing until Congress passes its own act. (Emphasis ours). [Debates 1945 Mo. Const. Conv. pp. 5559-5565]

The 1945 Missouri Constitutional Convention included what it thought would protect the people of this State; but it is clear that the Supreme Court of Missouri did not agree. The Supreme Court of Missouri in its pre-**Wesberry v. Sanders** opinion in **Preisler v. Hearnes**, Mo. Sup. Ct. en banc 1962, 362 S.W.2d 552, approved the 1961 Reapportionment Act eventually held to be unconstitutional by this Court in **Preisler I**, on the now rejected theory that "courts may not interfere with the wide discretion which the Legislature has in making apportionments . . . when legislative discretion has been exercised" (l.c. 555), and for the no longer valid reason that "any political compromise, for which there is any reasonable basis, is an exercise of legislative discretion that the courts must respect" (l.c. 557). Compare Footnote 12, infra. The refusal of the Supreme Court of Missouri to follow **Brown v. Saunders**, 159 Va. 28, 166 S.E. 105 (1932), the case to which Delegate Phillips made obvious reference, was the sort of rule that Mr. Justice Harlan has advocated in many of his dissents in apportionment cases. This Court, of course, is under duty to follow the majority and not the dissenting opinions of the Supreme Court.

5a (Page 8)

36 Law Week 3243 states that an appeal was filed in **Dinis v. Volpe**, December 4, 1967. We are advised that the order appealed from was one entered by the Massachusetts three-judge court on October 3, 1967 which approved a 1967 Congressional Redistricting Act of the Massachusetts Legislature under which the smallest district deviated from the ideal by minus 4,524 population and the largest district deviated from the ideal by plus 4,192 population. Law Week indicates that the question pre-

sented for Supreme Court review is the "competency of malapportioned state legislature to establish congressional districts in conformity with Fourteenth Amendment."

5b (Page 8)

The Supreme Court affirmed **Wells v. Rockefeller** (affirmed sub nom. **Rockefeller v. Wells**, No. 691, October Term, 1967) on December 18, 1967, by summary per curiam order. The Supreme Court's use of summary affirmance and reversals in Congressional apportionment cases, read closely with the rationale expressed by the lower courts, has provided a pattern that has been of substantial guidance to the lower courts in Congressional apportionment cases. **Wells v. Rockefeller**, for example, stated that the per curiam affirmance of **Preisler II**, 385 U.S. 450 (1967), the per curiam reversal of **Duddleston v. Grills**, 385 U.S. 455 (1967), and the per curiam in **Swann v. Adams III**, 385 U.S. 440 (1967), all decided January 9, 1967 were "determinative of the issues here." In **Preisler II**, for another example, this Court read the Supreme Court's summary dispositions in **Martin v. Bush**, 376 U.S. 222 (1964), **Drum v. Seawell**, 383 U.S. 831 (1966), and **Alton v. Tawes**, 384 U.S. 315 (1966), in a similar manner.

6. (Page 9)

The Oxford Dictionary defines PRACTICABLE as "capable of being carried out in action; feasible." Webster's definition is "that may be practiced or performed; capable of being put into practice; done or accomplished; feasible; as a **practicable** method; a **practicable** aim; a **practicable** good." Webster carries a note that "Practicable, practical are sometimes confused. That is Practicable (opposed **impracticable**) which is capable of being accomplished; that is Practical (opposed to **theoretical** and the like) which can actually be turned to account. See POSSIBLE."

The Oxford definition for PRACTICAL is "1. Of, pertaining, or relating to practice; exhibited in practice or action. Opp. to speculative, theoretical or ideal. 1617. b. Applicable in practice; practically useful. 1642. 2. Engaged in practice; practising, working. 1604. 3. Inclined to action (as opp. to speculation, etc); also, having ability for action. 1667. 4. That is such in practice; that is such in effect, though not nominally or professedly so; virtual. 1642. 5. Crafty, scheming, artful Foxe . . . P. politics is to do what you can and not what you ought. 1897."

Webster's definition states for PRACTICAL: "1. Of, pert. to, or consisting or manifested in, practice or action;—opposed to **theoretical, ideal** or **speculative**; as a **practical** question . . . 2. Available, usable, or valuable in practice or action, capable of being turned to use or account; useful; as a **practical** acquaintance with a language; practical economy."

7. (Page 12)

It is of interest to note that Mr. Justice Harlan would not have had any difficulty at all in affirming **Swann v. Adams III**. The avoidable variances involved in that Florida apportionment plan looked to Mr. Justice Harlan's tolerant eye as "relatively minor variations in population among some of the districts" 385 U.S. at 447. The Supreme Court's consistent rejection of the "classic legislative judgment" generality prohibits approval of a plan with avoidable variances by vague and subjective judicial classifications, unsupported by any evidence, on the firmly rejected theory that such variances are nevertheless to be treated as being of "no significant discrepancy" or as "'de minimis' departures." Such was the very purpose of **Swann v. Adams'** burden of proof rule.

8. (Page 13)

What has been said in the text is not to be read as suggesting that we believe it "possible to draw congressional districts with mathematical precision" **Wesberry v. Sanders**, supra at 18. Indeed, what is said is in recognition of the fact that congressional districts cannot be so drawn and that a plan not so drawn is not necessarily one that would not pass constitutional muster. Each case must be judged on its own facts.

9. (Page 18)

Almost all of the witnesses in **Preisler III's** hearing expressed grave concern about the prospect of electing Missouri's Congressional delegation at large. It probably is only of historical interest to note that at one point in Missouri's history one used fighting words if he suggested that Missouri elect her congressmen by any other method than by elections at large. Every Missouri Representative to Congress was elected at large until 1847. The Congress, by its Act of June, 1842, provided that all members of the House of Representatives "be elected by districts composed of contiguous territory . . .; no one district electing more than one Representative" (5 Stat. 491 (1842)). Missouri, in the face of that Congressional command, continued to elect its representatives at large, as did Georgia, Mississippi, and New Hampshire. The Twenty-eighth Congress was therefore faced with the problem of dealing with this recalcitrance.

Violent controversy arose in the Congress, the upshot of which was that the Congressmen elected at large were permitted by the Democratic majority to serve out their terms. James Butler Bowlin, elected at large from Missouri on the Democratic ticket, took the position that the Congress had no right or power to tell Missouri that she could not elect her Congressional delegation at large. That Missouri Congressmen, on page 189 of the Appendix to the Congressional Globe, 28 Cong. 1st Sess., said:

"Concede for a moment that Congress can district the States for the election of its own members, and you surrender enough to enable it to perpetuate its power forever." Alexander Stephens of Georgia, later Vice President of the Confederate States of America, elected at large from Georgia, took a similar position.

Missouri Congressman Bowlin vehemently protested against Congressional abolition of elections at large (under which application of the one-man-one-vote principle is automatic) and against creation of election districts by Congress where that body could command that "St. Louis should elect one representative, and the whole south and southwest of the State should elect another, making one vote in St. Louis equal to four or five in the country; because that would be a gross and palpable invasion of the franchise itself."

Missouri finally decided to comply with the Act of June, 1842 four years later and, except for the 1932 election, all of Missouri's Representatives to Congress have been elected by districts from 1846 to date. We have heard no protest against the possibility of malapportioning Missouri in favor of its urban population since 1844. But should that day come, judicial relief will be available to those whose constitutional right to an equal vote is abridged.

10. (Page 20)

In his Message of January 9, 1951 President Truman proposed that the 1842 election from districts requirement be re-enacted by the Congress. H.R. Doc. 36, 82nd Con., 1st Sess. President Truman's proposal was consistently incorporated in a series of bills introduced by House Judiciary Chairman Emanuel Celler, none of which have been enacted. See Congress and the Nation 1945-1964, published by Congressional Quarterly at page 1529.

It is of more than historical interest to note that Congressman Celler, writing in 1952, long before **Baker v. Carr** or **Wesberry v. Sanders** had been decided, stated that "the problem of [congressional apportionment] is one which involves the fundamental principle of equality which permeates our entire Constitution so that its denial imperils the very heart of our democracy" (17 Law. &U Cont. Prob. 268 at 274). He also stated that "a mere glance at the contours of various congressional districts and the wide variances in the population of these districts compels the conclusion that the drawing of congressional districts cannot be left to the whims and uncontrolled discretion of the states' legislaures" op. cit. supra, at 274), adding that "the history of apportionment in the United States, particularly since 1842 when standards were established for congressional districts, indicates conclusively that the one single factor that has always been lacking has been that of enforcement" (op. cit. supra, at 274-275). He therefore advocated in 1952, more than a decade

before **Wesberry v. Sanders**, that the Congress provide for "judicial review of the apportionment acts of states' legislatures in the United States district courts" (op cit. supra at 275). **Wesberry v. Sanders** obviated the necessity for any congressional action in that regard.

11. (Page 24)

We discuss elsewhere the legal consequences of defendants' failure to adduce evidence that the 1967 Legislature in fact took population trends into consideration. See Part I of Appendix C.

The undisputed facts show that the reason why the population of the rural District 6 was for the third successive time overvalued by a Missouri Legislature could not have been that the Legislature actually believed that district contained "areas with rapid population growth since 1960 and such population growth was taken into consideration," as defendants attempt to argue. An examination of population trends in the northwestern Missouri counties between 1950 and 1960 and since shows that, except by invading the population of Kansas City, Missouri by putting the population contained within its city limits into three separate congressional districts, the Fourth, Fifth and Sixth, the entire geographical area included in District 6 under the 1967 Act, i.e., all of the geographical area outside the city limtis of Kansas City, had a net loss in population between 1950 and 1960. Every county included in District 6 lost population except Platte, Clay and Ray Counties. Ray County's gain was 143. Very substantial parts of Clay and Platte Counties are inside the city limits of Kansas City. The net population loss for all counties included in District 6 was 40,467. The net gain in Platte, Clay and Ray Counties between 1950 and 1960 was 50,773. But of that gain, only approximately 12,043 was produced in areas outside the Kansas City limits. It is thus apparent that excluding the population of Kansas City within its city limits there was a net population loss of 28,424 for the area included in District 6; facts that hardly support the reason assigned by defendants in their brief for the drawing of that District's lines. We find that the 1967 Act robbed Kansas City of population within its city limits for the same obvious reasons that like robbery was attempted in the 1961 and 1965 Acts.

12. (Page 32)

The **Hitchcock** case illustrates that in the year 1912, the Supreme Court of Missouri had no difficulty in holding that it was "quite firmly wedded to the doctrine that constitutional requirements must be considered as mandatory, rather than directory" (146 S.W. at 50) and that "courts have jurisdiction to entertain an action, pass on the validity of acts apportioning the

state into senatorial districts, and to declare them invalid for infringement upon the Constitution . . ." (146 S.W. at 53). On the merits that case held that giving the city of St. Louis only six senators when a practicable division of the population required seven was a "most flagrant violation of the limited discretion granted by the Constitution to the Legislature" (146 S.W. at 54). Relying upon a Michigan case "Giddings v. Blacker, 93 Mich. 1, 52 N.W. 944, 16 L.R. A. 402), the Supreme Court of Missouri stated that "the time for plain speaking has arrived in relation to the outrageous practice of gerrymandering, which has become so common, and has so long been indulged in without rebuke that it threatens . . . the permanency of our free institutions. . . . There is not a school boy but knows what is the motives of these legislative apportionments; it is idle for the courts to excuse the action upon other grounds, or to keep silent as to the real reason. . . ." (146 S.W. at 57).

People who complain today about how federal courts describe the malapportioning action of State legislatures should become more familiar with what state courts had to say on that same subject fifty years ago. Present difficulties arose, of course, because state courts ceased to enforce the express provisions of state constitutions. See Footnote 5, supra.

13. (Page 59)

Defendants' table is purportedly based on data published in the Congressional Quarterly Weekly Report for September 16, 1966, and August, 1967 issue of the National Municipal League, and U.S. Senate Report No. 219, 90th Cong. 1st Sess., June 1, 1967, together with letters from the Attorney Generals of various states.

No such data comparable to defendants' "Total % of Deviation" column appears in any of those sources. The Congressional Quarterly Weekly Report for September 16, 1966, on page 814, does contain a table purporting to set forth "% Maximum Variations" form the various states. None of the figures on that table agree with any of the figures on defendants' table. We have not been favored with copies of the letters received from the various Attorney Generals.

The particular percentage figures used on defendants' table, in any event, are necessarily inaccurate. An examination of other percentage figures on the Table shows that defendants merely added together the percentages by which the largest and the smallest districts of a particular State purportedly deviated from the ideal district for that State. The sum of those percentages does not reflect the accurate percentage of deviation between the largest and smallest districts; the simple addition of

those figures will always produce a smaller percentage figure than that produced by accurate mathematical calculation.

The "Total % of Deviation" column on Defendants' Table is therefore smaller than what are the actual percentage deviations between the highest and lowest districts accurately calculated in accordance with proper mathematical principle.

This fact of mathematical life is illustrated by an examination of the Table introduced in the House of Representatives last April 25, 1967 by Representative Conyers of Michigan as it appears in the Congressional Record, 90th Cong. 1st Sess. page H4620. That table sets forth three columns: (1) % deviation between highest and lowest; (2) % deviation between largest and ideal; and (3) % deviation between smallest and ideal. The maximum deviation between the largest and smallest is always a larger percentage figure than the total of the two other columns. Defendants' Table, as we have noted, attempts to play another form of the numbers game in order to make larger figures look smaller on their table.

14. (Page 66)

Intervenors argue in a smilar vein that the "Supreme Court's affirmance of an apportionment in Mississippi which is less nearly perfect than ours compels the conclusion that our 1967 Act is within acceptable constitutional limits" and that "under these circumstances it would be an abuse of judicial power to strike down the hard product of the legislative process." We refrain from commenting on intervenors' claim of the 1967 Act as "our 1967 Act" other than to state that, so far as the record in this case shows, we are required to consider the 1967 Act as the 74th General Assembly of Missouri; not that of the intervenors.

We feel compelled to state further that it is our view that the right of any proper party to a direct appeal to the Supreme Court of the United States is ample protection against any alleged abuse of judicial power conferred on this Court by the Constitution and laws of the United States. In **Preisler II** we welcomed an appeal in order that the obvious question of conflict between the rationale of **Preisler II** and that of **Martin v. Bush II**, 251 F.Supp. 484, would be squarely presented, to the Supreme Court for its final resolution (257 F.Supp. at 979, footnote 17). We feel the same way about an appeal in **Preisler III** even though no present conflict with any other court is presented. All courts, both State and Federal, have followed and properly applied **Swann v. Adams III** and **Kilgarlin v. Hill** except the two-judge majority opinion in **Rhodes v. Lucas**, supra. That potential conflict was eliminated by the recent Supreme Court reversal of **Rhodes**.

15. (Page 67)

The "wholly separate question" of whether New York's 1961 Congressional apportionment act could withstand an Art. I, §2 challenge was presented in the most recent case of **Wells v. Rockefeller**, supra. Defendants argued in that case that the Supreme Court had "approved" the population variances by its affirmance of the New York three-judge court in **Wright v. Rockefeller**, and the similar Fourteenth Amendment case of **Honeywood v. Rockefeller**, 376 U.S. 222. The recent opinion of the New York three-judge court in **Wells v. Rockefeller**, supra, at page 5, disposed of defendants' argument by holding that: "It is thus clear beyond a doubt that neither **Wright** nor **Honeywood** dealt with population disparities. Nor can they be made a sound basis for an argument that the constitutionality of the present congressional districting statute has been sustained by these decisions."

16. (Page 70)

Consistent with our now well established practice of discussing every case upon which the defendants rely in these congressional apportionment cases, a further word should be added in regard to **Meeks v. Avery**, supra. As a part of their attempted justification-by-comparison-with-other-states argument, defendants assert that the Kansas three-judge court approved a plan in which "the population of the largest district is 459,063 and the population of the smallest district 394,056" and that "this act was found to be in compliance with the population requirements of the United States Constitution in **Meeks v. Avery**." "Thus," defendants attempt to argue, "the United States District Court in Kansas . . . has approved congressional districts in the State of Kansas which have population variations well in excess of the districts in the 1967 Missouri Congressional Redistricting Act."

Keeping always in mind the principle stated in **Swann v. Adams III** that a variation from the norm "approved in one State has little bearing on the validity of a similar variation in another State" (385 U.S. at 445), it is appropriate only to add that defendants apparently did not even read the Kansas case before they cited it. That court held that Kansas State census figures could be used; that the accuracy of those figures was not questioned by anyone; that the apparent 1960 federal census variation of 41,666 was not real; that the 8,490 variance under the State census was the actual variance; and that such variance was justified under the rationale of **Martin v. Bush II**, a case that we expressly refused to follow in **Preisler II**. We hold that the Kansas case has no more bearing on our decision in **Preisler III** than it had on our decision in **Preisler II**, for all the reasons we have generally stated in regard to defendants' comparative table argument. See also Appendix D.

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IN THE

SUPREME COURT OF THE UNITED STATES.

No. [redacted] 30

OCTOBER TERM, 1968

JAMES C. KIRKPATRICK, Secretary of State of Missouri, and NORMAN H. ANDERSON, Attorney General of Missouri,

and

F. V. HEINKEL, R. J. ROSIER, W. W. BECKETT, A. D. SKIPPINGTON, L. O. WALLIS, MILLER HERN, HERMAN HETLAGE, HERMAN KERTZ, TURPIN YOUTSEY and GLEN MYERS,

Appellants,

vs.

PAUL W. PREISLER, LOUISE ERBE, BOSTIC J. FRANKLIN, LUCILE RIEDEL, DOROTHY CHILDS, SARAH RIFKIN and MARTHA LEONARD,

Appellees.

On Appeal from the United States District Court for the Western District of Missouri, Central Division.

MOTION TO AFFIRM.

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St. Louis Law Printing Co., Inc., 411-15 N. Eighth St., 63101. CHestnut 1-4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

No. .....

OCTOBER TERM, 1967.

JAMES C. KIRKPATRICK, Secretary of State of Missouri, and NORMAN H. ANDERSON, Attorney General of Missouri,

and

F. V. HEINKEL, R. J. ROSIER, W. W. BECKETT, A. D. SAPPINGTON, L. O. WALLIS, MILLER HERN, HERMAN HETLAGE, HERMAN KERTZ, TURPIN YOUTSEY and GLEN MYERS,

Appellants,

vs.

PAUL W. PREISLER, LOUISE ERBE, BOSTIC J. FRANKLIN, LUCILE RIEDEL, DOROTHY CHILDS, SARAH RIFKIN and MARTHA LEONARD,

Appellees.

On Appeal from the United States District Court for the Western District of Missouri, Central Division.

MOTION TO AFFIRM.

Appellees, pursuant to Rule 16 of the Revised Rules of the United States Supreme Court, move the Court to affirm the final judgment and decree sought to be reviewed on appeal on the ground that it is manifest that the questions on which the decision of this cause depend are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE.

The "Statement of the Case" by Appellants, Secretary of State Kirkpatrick and Attorney General Anderson of Missouri, is adopted, with exception being taken to their inclusion of several statements as facts which are argumentative and controversial. The "Statement of the Case" by Appellants Heinkel et al., is, in general, unacceptable in that it is principally argumentative.

Some statements of Appellants, Secretary of State and Attorney General of Missouri, to which exception is taken, are incomplete and are presented in a manner which may result in many misleading impressions, interpretations, and implications.

For example, all of the discussion of the matters to which the General Assembly (the Legislature) gave consideration in making the districts is pure speculation, since there is no record taken of the debates in either House nor in their districting committees. Testimony before the court by legislative leaders to which reference is made as "uncontroverted" and factual, actually represents only the respective opinion of each of only 4 members of a legislative body of 163 representatives and 34 senators.

Another example is the inclusion of the table of incorrectly calculated district population figures, apparently stated as an excuse for the enactment of an unconstitutional and invalid districting Act.

Another example is the inclusion of the percentage variation of the district populations from the "ideal" or average which tends to make the population differences between districts appear of lesser value and lesser importance.

Populations of districts should be compared to each other; people vote, percentages do not vote.

But for the improper inclusions of such matters as the foregoing in the "Statement of the Case", Appellees would not discuss same under this heading; these points will be discussed under "Argument".

ARGUMENT.

All of the "Questions Presented" by both groups of Appellants in their respective "Jurisdictional Statements" are unsubstantial.

The several "Questions Presented" by Appellants, James C. Kirkpatrick, Secretary of State of Missouri and Norman C. Anderson, Attorney General of Missouri, as stated on pages 3 through 5 of their "Jurisdictional Statement", will be considered first.

The same general questions are presented by Appellants, Heinkel et al., in their separate "Jurisdictional Statement" and the same arguments of Appellees apply to their questions respectively. These Appellants present an additional question which will be discussed following the discussion of the above questions.

The opinion, decision and judgment of the three-judge District Court extensively and adequately present and discuss the law as applied to the facts of the instant case and the court reaches the correct and appropriate determination and disposition of the issues in deciding that the congressional representative districts of Missouri as set forth in the 1967 Redistricting Act (Sections 128.203 through 128.305, Revised Statutes of Missouri, Cumulative Supplement 1967) are unconstitutional and void for violation of Article I, Section 2 of the United States Constitution.

The "Questions Presented" by Appellants Kirkpatrick and Anderson are unsubstantial.

The **first question presented** (numbered 1) by these Appellants, that the court erroneously misconstrued **Wesberry v. Sanders**, 376 U. S. 1 (1964), by finding that a districting plan would be unconstitutional if there were

any other plan with smaller variations proposed to the Legislature or to the court, is a misunderstanding by Appellants of the court's construction of the districting Act. An adopted plan of the Legislature which is constitutionally valid would not be subject to judicial attack. Alternative proposed plans, because of the Legislature's inherent discretion of selection, could not be the basis of invalidation of an otherwise valid act.

Judge Collinson in his concurring opinion so aptly states on page 97 of "Appendices to Jurisdictional Statement" of the Appellants:

> "No one can believe or contend that the Supreme Court has said that the 'one-man one-vote' doctrine requires that Congressional districts be exactly equal in population; certainly the majority opinion does not so state. But neither has the Supreme Court said that there is a mathematical formula for inequality (within a certain percentage) which will satisfy the 'nearly equal as practicable' rule."

and on page 98,

> "I do not condemn the 1967 Act because there were more equal plans defeated in the Legislature; nor do I condemn it because it divides St. Louis County between a number of districts. I believe **the plan is unconstitutional because on its face and under the undisputed evidence it is not an attempt to divide the State of Missouri in Congressional districts that are as nearly equal in population as is practicable.** And this **for the reason that it is obvious that entire counties can be moved to adjoining districts with a resulting substantial decrease in the variances of population in the present Act** and because **there is no evidence in this record that can be said to explain or justify why this was not done.**" (Emphasis supplied.)

This first question presented is unsubstantial for the above reason and others to be found in the opinion, decisions, and judgment of the court. (See map in Appendix to this Motion to Affirm.)

Under section 1. of "The Questions Are Substantial" on page 10 of the "Jurisdictional Statement" of Appellants, the majority opinion is **incompletely quoted** by Appellants, as follows:

> "The majority opinion of the court in the case on appeal finds that the population requirements of Article I, Section 2, of the Constitution have not been met in a congressional redistricting plan if the population variations between the districts are '* * * greater than those that would have been created by better plans in fact presented to but rejected by a legislature or those created by similar plans that may be presented to a court in the trial of an apportionment case. * * *.'"

The **full quotation** of the majority opinion is found on page 12 of "Appendices of Jurisdictional Statement" and reads as follows:

> "We believe that the Supreme Court's reversal in **Kilgarlin v. Hill** [386 U. S. 120], is at least an implicit rejection of any notion that the judicial use accorded the phrase '*de minimis*' can be converted into either an exception to the burden of proof rule so recently established by the Supreme Court in apportionment cases or as an independent defense that **may, without proof, be said to justify variances** greater than those that would have been created by better plans in fact presented to but rejected by a legislature or those created by similar plans that may be presented to a court in the trial of an apportionment case." (Emphasis supplied.)

This unfortunate omission is brought to the Court's attention because of the possible misinterpretation that might otherwise be made of the opinion, decision, and judgment of the court below.

The **second question presented** (numbered 2), which states that the court's opinion, decision, and judgment is in conflict with several cited cases because it rejects the principle that population variations between districts which are "de minimis" are constitutionally permissible, is an erroneous statement of the court's interpretation of the cases and of the term "de minimis".

This question is unsubstantial because there are such large population variations between adjacent districts (for example, 25,802 between the 8th and 4th districts and 21,655 between the 8th and 10th; see Appendix A) which cannot be considered "de minimis" when lesser variations could have easily been attained through the transfer of large population counties between adjacent districts which an examination of the map and the table of district populations (Appendix A of "Appellees' Motion to Affirm") will readily reveal.

The **third question presented** (numbered 3) contending that there are so called "minor variations" between the districts is unsubstantial, when there exist such great differences between districts of 25,802 and 21,655 which could have easily been greatly diminished by the transfer of whole counties even as large as 10,000 from the higher population to the lower population districts (see map, Appendix A of "Appellees' Motion to Affirm").

The **fourth question presented** (numbered 4) contending that the authority of **Connor v. Johnson**, Civ. No. 3830, S. D. Miss., was "erroneously rejected in the opinion, decision and judgment of the court" is unsubstantial because the court correctly interpreted the inapplicability

of the Mississippi case to the Missouri situation. (See page 65 of Appellants' "Appendices to Jurisdictional Statement".) The **only** question presented in the Mississippi case on the appeal of the case to the Supreme Court of the United States (October Term, No. 999. Affirmed, March 27, 1967, 386 U. S. 483) precisely and only the following issue:

> "Whether the congressional district lines drawn by the 1966 session of the Mississippi legislature, which, deliberately or otherwise, have a racially discriminatory effect, violate the Fourteenth and Fifteenth Amendments to the U. S. Constitution."

The population of the districts is not "fairly comprised" in this statement.

The **fifth question presented** (numbered 5) contends that the decision allows no legislative interplay, no variation from absolute mathematical equality between districts, and renders nugatory considerations other than population. At no time during the entire proceedings of this case, do Appellees question the authority of the Legislature to consider any factors they may deem desirable in making districts. Appellees are only interested in the population conforming to constitutional standards. The court has declared on page 9 of "Appendices to Jurisdictional Statement",

> "The principle is firmly settled that the proponents of a redistricting plan must sustain the burden of justifying **any** deviation from practicable equality of population (citing cases). This Court must also follow and apply **Kilgarlin v. Hill's** express requirement that before a particular plan may be approved as constitutional the District Court must be able, from the evidence adduced by the defendant, to articulate legally acceptable reasons for the specific variations in population between districts that have been shown to ex-

ceed the 'as nearly as is practicable' standard of Art. I, § 2."

Therefore, the fifth question presented is unsubstantial.

The **sixth question presented** (numbered 6) contends that some conclusions of the Court were based on inaccuracies in the "Findings of Fact". Appellees contend that, if Appellants considered that the inaccuracies of the District Court complained of were of such magnitude that the inaccuracies might have even remotely affected the conclusions of the court or that the court may have based its conclusion on inaccurate data, Appellants could have and should have brought their claims to the District Court through a motion for a rehearing of the cause before the District Court. Therefore, the sixth question presented is unsubstantial.

The **seventh question presented** (numbered 7) contends that the court erroneously found that the 1967 Missouri Congressional Redistricting Act does not comply with Article I, Section 2, of the Constitution of the United States. The question is unsubstantial because the districts could have easily and readily been made more nearly equal in population by the simple transfer of whole counties or smaller established political units in the more populous areas, from one adjacent district to another, and by a few such transfers greatly lower the population variances. Population variances of 25,802 are not "minor" as termed by the Appellants when much lower variances could have been obtained by a few such transfers as shown on the face of the map.

Nor should the rights of a citizen be abridged for political expediency. The court on page 16 of the "Appendices to Jurisdictional Statement" states:

> "... since **Wesberry v. Sanders** no State legislature in the United States can unnecessarily abridge one's

right to an equal vote in a congressional election any more than it may constitutionally deny one his right to trial by jury, his right of free speech, his right to freedom of religion, his right of peaceful assemblage, or any one of his many other rights guaranteed by the Constitution of the United States."

The "Questions Presented" by Appellants Heinkel et al., are unsubstantial.

The same arguments as made above apply to the second, third, and fourth "Questions Presented" by these Appellants.

The **first question presented**, by these Appellants, Heinkel, et al., is unsubstantial.

Differences in population between adjacent districts of as great as 25,802 (4th and 8th Districts), when whole counties of about 10,000 population could easily have been transferred from the higher district to the lower to make the variation much less, are unconstitutional and void for violation of Article I, § 2 of the United States Constitution.

The inclusion of the official census figures for military personnel of Fort Leonard Wood, the State Capitol at Jefferson City, and students at the Missouri University in the county populations, and hence in the Eighth District population, is valid and cannot be used as an excuse for diminishing the population excess of the Eighth District. A similar population inclusion was presented in **Davis v. Mann**, 377 U. S. 678 (1964) and upheld. (See "Appendices to Jurisdictional Statement" of Appellants, pages 46 and 47.)

The **fifth question presented** (numbered 5) of the Appellants, Heinkel, et al., on page 5 of their "Jurisdictional Statement" contend that the testimony of their witnesses

at the Hearing on October 23, 1967, was undisputed. This question is unsubstantial because the Appellees stated on page 30 of the "Transcript of Proceedings" of the Hearing on October 23, 1967, the following:

> "If the Court please, I have sort of a general objection to the testimony of the members of the General Assembly, which I think is best illustrated by the testimony we have received from Mr. Rabbitt.
>
> "In a sense, the testimony of these individuals is self-serving, not only to himself, to his political party, to his political faction, political area and also his political career.
>
> "This is not an ordinary bill. This is one in which we have a lot of controversy. The mere fact that there might be bi-partisan agreement does not cure the possible bias and prejudice of some of the individuals. We do not know what their testimony is. We do not know what they did in their own minds to get them finally to vote upon this.
>
> "There is also the question of separation of power here, the conduct of the legislature, how they behave, what is in the minds of these various people as they make up a bill, is not something that this Court should really inquire into, and there are no records of the committee, which I think is brought out; there is no record of the floor debate.
>
> "There is no possible way to determine the reasons nor the motives of these legislators, whether they were population-motivated or whether they had other motivation, and we could bring in 163 plus the 34 members of the Senate and still this Court could not get necessarily what was on their minds when they voted for that bill, and I feel the Court will ultimately have to judge, at least in my opinion, and I think in the opinions that you find in some of the other courts, on the actual result of what they pro-

duced, not upon how it got there, and therefore I feel that much of this testimony, an example of what we have gotten so far, will merely give an idea what went on in the Legislature and a degree of speculation."

and continuing the Appellees' objections on page 70,

"Your Honor, in view of my previous statement that I felt the witnesses should be excluded entirely as being unnecessary, in view of the fact that the map that is documentary evidence and the various other matters of which the Court might take judicial notice, plaintiffs will not call any witnesses."

Appellees served notice that certain witnesses might be called but elected not to do so for the above stated objections and reasons.

CONCLUSION.

Appellees pray the Court to affirm the judgment sought to be reviewed on appeal on the ground that it is manifest that the questions presented are so unsubstantial as not to need further argument.

Respectfully submitted,

PAUL W. PREISLER,
4274 Shenandoah Avenue,
Saint Louis, Missouri 63110,
Attorney for Appellees.

The Congressional Representative Districts of Missouri Created by the 1967 Redistricting Act.

The official district population data prepared by the Bureau of the Census (Item 13 of "Stipulation of Evidence") is as follows:

District	Population	District	Population
1	439,746	6	422,238
2	436,448	7	436,769
3	436,099	8	445,523
4	419,721	9	428,223
5	431,178	10	423,868

State total population: 4,319,813

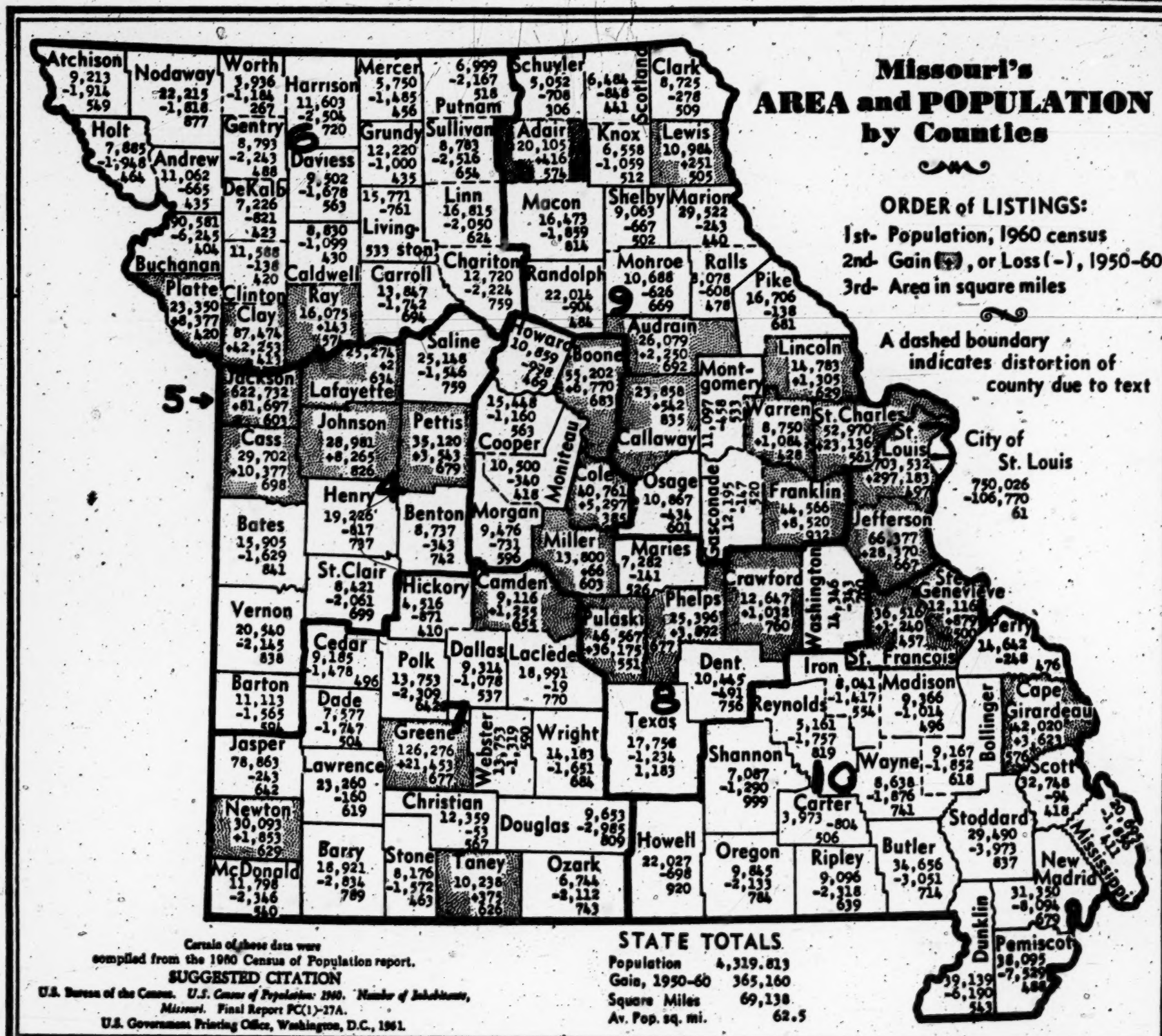
District average population: 431,981

The City of St. Louis (a city not within a county) contains a part of District 1 and a part of District 3.

The County of St. Louis contains all of District 2 and a part of each of Districts 1, 3, 8, and 9.

Jackson County contains all of District 5 and a part of District 4.

Kansas City contains all of District 5 and a part of District 4.


Missouri's
AREA and POPULATION
by Counties
ORDER of LISTINGS:
1st- Population, 1960 census
2nd- Gain (+), or Loss (-), 1950-60
3rd- Area in square miles
A dashed boundary indicates distortion of county due to text
City of St. Louis
750,026
-106,770
61
Atchison 9,213 -1,914 549
Nodaway 22,215 -1,818 877
Worth 3,936 -1,184 267
Harrison 11,603 -2,504 720
Mercer 5,750 -1,485 456
6,999 -2,167 518
Putnam
Schuyler 5,052 -708 306
6,484 -848 441
Scotland
Clark 8,725 -278 509
Holt 7,885 -1,948 464
Gentry 8,793 -2,243 488
Grundy 12,220 -1,000 435
Sullivan 8,783 -2,516 654
Adair 20,105 +416 574
Knox 6,558 -1,059 512
Lewis 10,984 +251 505
Andrew 11,062 -665 435
Daviess 9,302 -1,678 563
DeKalb 7,226 -821 423
15,771 -761
Linn 16,815 -2,050 624
Macon 16,473 -1,859 814
Shelby 9,063 -667 502
Marion 29,522 -243 442
90,581 -6,245 404
8,830 -1,099 430
Living-ston
Buchanan
11,588 -136 420
Caldwell
Carroll 13,847 -1,742 694
Chariton 12,720 -2,224 759
Randolph 22,014 -904 484
Monroe 10,688 -626 669
Ralls 8,078 -608 478
Pike 16,706 -138 681
Platte 23,350 +8,377 420
Clinton 11,677 +143 571
Clay 87,474 +42,253 413
Ray 16,075 +143 574
Saline 25,148 -1,546 759
Howard 10,859 -928 469
Boone 55,202 +6,770 683
Audrain 26,079 +2,250 692
Lincoln 14,783 +1,305 629
Jackson 622,732 +81,697 603
25,274 +2 634
Lafayette
15,448 -1,160 563
Cooper
Moniteau
23,858 +542 835
Callaway
Mont-gomery 11,097 +558 533
Warren 8,750 +1,084 428
St. Charles 52,970 +23,136 561
St. Louis 703,532 +297,183 497
Cass 29,702 +10,377 698
Johnson 28,981 +8,265 826
Pettis 35,120 +3,543 679
10,500 -340 418
Cole 40,761 +5,297 385
Osage 10,867 -434 601
Gasconade 12,195 -147 520
Franklin 44,566 +8,520 932
Jefferson 66,377 +28,370 667
Henry 19,226 -817 737
Benton 8,737 -343 742
Morgan 9,476 -731 596
Miller 13,800 +66 603
Maries 7,282 -141 526
Bates 15,905 -1,629 841
St. Clair 8,421 -2,061 699
Hickory 4,516 -871 410
Camden 9,116 +1,255 651
Crawford 12,647 +1,032 760
Washington 14,340 +1,342 478
Ste. Genevieve 12,116 +879 500
36,516 +1,240 457
Perry 14,642 -248 476
Vernon 20,540 -2,145 838
Cedar 9,185 -1,478 496
Polk 13,753 -2,309 642
Dallas 9,314 -1,078 537
Laclede 18,991 -19 770
Pulaski 46,567 +36,175 551
Phelps 25,396 +3,892 677
Dent 10,445 -491 756
Iron 8,041 -1,417 554
St. Francois
Madison 9,366 -1,014 496
Barton 11,113 -1,565 594
Dade 7,577 -1,747 504
Texas 17,756 -1,234 1,183
Reynolds 5,161 -1,757 819
Bollinger
Cape Girardeau 42,020 +3,623 578
Jasper 78,863 -243 642
Greene 126,276 +21,453 677
Webster 15,753 +1,319 590
Wright 14,183 -1,651 684
Shannon 7,087 -1,290 999
Wayne 8,638 -1,876 741
9,167 -1,852 618
Scott 32,748 -94 418
Lawrence 23,260 -160 619
Christian 12,359 -53 567
Douglas 9,653 -2,985 809
Carter 3,973 -804 506
Stoddard 29,490 -3,973 837
30,693 -1,641
Mississippi
Newton 30,093 +1,853 629
Barry 18,921 -2,834 789
Stone 8,176 -1,572 463
Taney 10,238 +375 626
Ozark 6,744 -2,112 743
Howell 22,027 -898 920
Oregon 9,845 -2,133 784
Ripley 9,096 -2,318 639
Butler 34,656 -3,051 714
New Madrid 31,350 -8,094 679
McDonald 11,798 -2,346 540
Dunklin
Pemiscot 38,095 -7,529 486
39,139 -6,190 543
Certain of these data were compiled from the 1960 Census of Population report.
SUGGESTED CITATION
U.S. Bureau of the Census. U.S. Census of Population: 1960. Number of Inhabitants, Missouri. Final Report PC(1)-27A.
U.S. Government Printing Office, Washington, D.C., 1961.
STATE TOTALS
Population 4,319,813
Gain, 1950-60 365,160
Square Miles 69,138
Av. Pop. sq. mi. 62.5

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NO. 1116

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

JAMES C. KIRKPATRICK, Secretary of State of Missouri, and NORMAN H. ANDERSON, Attorney General of Missouri,

Appellants,

vs.

PAUL W. PREISLER, LOUISE ERBE, BOSTIC J. FRANKLIN, LUCILE RIEDEL, DOROTHY CHILDS, SARAH RIFKIN, and MARTHA LEONARD,

Appellees.

On Appeal from the United States District Court For the Western District of Missouri Central Division.

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO AFFIRM.

PRELIMINARY STATEMENT.

The motion to affirm filed by Appellees adopted Appellant's statement of the case with certain exceptions. These exceptions are unfounded and Appellants' statement of the case should stand as presented.

Appellees object to that part of the statement of the case which summarizes the testimony of certain leaders of the

Missouri Legislature, viz., the Chairman of the Senate Committee on Reapportionment and the Majority and Minority leaders of both houses. The testimony of these legislative leaders reflected their intimate knowledge of the consideration of congressional redistricting by the legislature. These leaders were in a position to know, and did know, the considerations which were taken into account by the legislature in considering this problem. Their testimony was uncontroverted. Appellants notified Appellees several days in advance of the hearing that these witnesses would testify and therefore, Appellees had ample time to call as many witnesses as they might care to. Appellees did in fact subpoena five members of the legislature who appeared in court but were not called as witnesses.

Appellees also object to the inclusion in the statement of the case of the table reflecting the supposed populations of the districts in the 1967 Missouri Congressional Districting Act which were before the legislature upon final enactment of the Law. After this litigation commenced it was discovered that these district populations were inaccurately calculated. Appellants do not understand the nature of Appellee's objection to the inclusion of this table. The table was included in the majority opinion of the court below and is found on Page 6 of Appendices to Jurisdictional Statement. The table is a part of the evidence in the record and an understanding of this case is incomplete without its inclusion.

Appellees also object to Appellants setting forth the variations from ideal of the populations of the districts expressed in percentage terms. The cases on reapportionment in which the courts have stated such variations in percentage terms are legion. In **Bush v. Martin** S.D.Texas (1966) 251 F.Supp. 484, l.c. 511, the court commented upon the expression of population differences in percentage terms as follows:

"But despite these expressions, the fact remains that

the goal of numerical equality deals with numbers and in the final analysis the end result is tested in numbers —e.g., this much deviation is too much, or this much deviation is permissible under these circumstances. And numbers means a comparison by percentage or ratio with the Ideal. Consequently, while we might be forbidden to lapse into arithmetical language in expressing approval or rejection, we certainly think that in testing whether a good faith effort was made by the Legislature, it is proper both to assay the mathematical standard set by the Legislature as its guide and to indicate for future action the outside maximum permissible deviation."

The issue in congressional redistricting cases is whether or not the vote of Mr. "X" has been diluted in a fashion that is repugnant to the fundamental principles of representative government. Furthermore, use of percentages is necessary to place the situation in a given state in true perspective. For example, 10,000 people in New York State, with a total 1960 population of nearly 17,000,000 and 10,000 people in Alaska, with a total population of slightly over 200,000, would hardly be the same for legislative apportionment purposes. Use of raw population data alone would be highly misleading. A determination of whether or not there is significant vote dilution cannot be effectively measured or expressed except in terms of percentage.

Therefore, Appellants' statement of the case in its Jurisdictional Statement stands as a concise statement of the facts material to the consideration of the questions presented by the appeal.*

*Appellants direct attention to a typographical error on page 9 of the Jurisdictional Statement. On line 20 of page 9 the population of Jackson County is stated to be over 60,000. In fact, the population of Jackson County is over 600,000.

ARGUMENT.

1.

The first question presented by Appellants in its Jurisdictional Statement contends that the opinion, decision, and judgment of the lower court erroneously construed **Wesberry v. Sanders** by finding that congressional districts are not as equal in population as practicable if any other plan proposed to the legislature or to the court can result in districts with smaller population variations. In Appellants' statement of the reasons why the questions presented are so substantial as to require plenary consideration Appellants quote from the majority opinion in support of its understanding that the court adopted the principle as stated in the question presented. Appellees claim that Appellants have misrepresented the majority opinion by incompletely quoting from the opinion.

Inasmuch as Appellees imply that the full meaning of the majority opinion is not reflected in Appellants' discussion of this question some explanation may be in order for Appellants use of one clause in a particular sentence from the majority opinion. The full sentence enunciates the following two principles: 1. The United States Supreme Court has rejected the judicial use accorded the phrase de minimis as a principle justifying variation in the populations of congressional districts. 2. If better plans are presented to the legislature or to the court, a congressional redistricting act has not created districts as nearly equal in population as practicable.

Appellants discuss the erroneous rejection of the de minimis principle in another part of its statement of the reasons why the questions are substantial. Appellants raised separately the second erroneous principle in regard to "better plans." There is absolutely no question whatsoever that the majority opinion does find that congressional districts are

not as nearly equal in population as practicable if any plan has been submitted to the legislature or to the court reflecting congressional districts with population variations closer to mathematical equality. An examination of the majority opinion discloses that it is permeated with statements and declarations which can have no other meaning. See, e.g., Appendices to Jurisdictional Statement, Pages 7, 9-10, 13-14, 15, 17, 36, 49-50, 55, 56, 64 and 65.

The principle in question is unequivocally adopted by the lower court following its discussion in support of the proposition that the phrase "as nearly equal as is practicable" is a precise constitutional standard. This discussion commences in Appendices to Jurisdictional Statement, Page 47 and is concluded on Page 59. The discussion is climaxed on Page 59 with the following ringing pronouncement:

> "The standard of 'as nearly as practicable' means today what it meant to Daniel Webster and has meant throughout our history. Within the context of congressional districting, if plans before the legislature or in evidence before a court establish that more equal districting was obtainable than that which was adopted, then obviously the plan enacted, on the facts, does not meet the now constitutional command that the districting be equal 'as nearly as is practicable.' "

Appellees attempt to water down this stringent but erroneous principle by reference to the clarifying comments of Judge Collinson who had concurred in the majority opinion. Appellees incorrectly refer to these comments of Judge Collinson as "his concurring opinion." An examination of the comments reflects that Judge Collinson is attempting some clarification of his concurrence in the majority opinion by reason of the views expressed in Judge Matthes' dissenting opinion. Although Judge Collinson has attempted to clarify his views his concurrence in the majority opinion remains

unaltered. Significantly, this attempted clarification by Judge Collinson concludes by reiterating the views in the majority opinion to the effect that he considers the 1967 act unconstitutional solely because a better plan had been presented to the court.

Certainly the dissenting Judge is in no doubt as to the import of the majority opinion. The views of Judge Matthes in this regard are expressed as follows, Appendices to Jurisdictional Statement; Page 83.

> "In my view the majority effectively but unwarrantedly sounds the death knell to the 'de minimis' doctrine in the field of Congressional redistricting. **If the majority opinion survives and becomes the law, no Congressional redistricting act enacted by the Missouri Legislature can withstand judicial scrutiny so long as that body could conceivably formulate a better plan which would mathematically redistrict the state with greater equality.** In short, the majority rejects the Missouri plan despite the relatively minor variations in populations between districts because it does not approach their standards of perfection. Their position necessarily leads to the conclusion that only the courts can ultimately assume and properly complete the task of Congressional redistricting—a function primarily committed to the state legislatures. Even the courts, however, would be beset with difficulties in formulating court plans to comply with the unduly strict and unrealistic standards enunciated by the majority." (Emphasis Added)

And Pages 92 and 93 as follows:

> "The underlying rationale of the majority is very disturbing to me. Careful analysis of their opinion will permit only one conclusion—that if in the judgment of the court, not the legislature, a plan providing for greater

equality in representation can be formulated, the legislative plan must fail. Appendices A and B attest to this conclusion. In those appendices the court has engaged in a game of 'redistricting checkers' by shifting counties and townships from one district to another in order to demonstrate how smaller deviations could have been reached. This reasoning runs counter to my conception of the law."

The substantial nature of this question is dramatically presented in the concluding paragraph of the dissenting opinion as follows, Page 93:

"* * * If every apportionment Act must be cast aside because a reviewing court could devise a scheme for more equal representation, I believe it is high time that the Supreme Court, in no uncertain language, promulgates such a standard * * *."

2.

The second question presented in the Jurisdictional Statement contends that the opinion, decision, and judgment of the lower court is in conflict with numerous decisions of this court in that the court rejected the principle that population variations in congressional districts which are de minimis are constitutionally permissible. The lower court further finds that minor variations in population of congressional districts are unconstitutional in the absence of competent and substantial evidence justifying the variations.

Appellees claim that the statement of this question is "* * * an erroneous statement of the court's interpretation of the cases and of the term 'de minimis'." (Motion to Affirm, page 7) Appellants utterly fail to support this claim.

The validity of the question is demonstrated beyond doubt by the majority opinion in the Appendices to Jurisdictional Statement. After reviewing the effect of de minimis

population variations in appropriate cases, the court relegated the de minimis principle to the bone yard with the following declaration (page 12):

> "'* * * De minimis,' we suggest, belongs where Mr. Justice Clark put it in his concurring opinion in Baker v. Carr; among discarded generalities such as 'classic legislative judgment' and 'no significant discrepancy'."

As noted above in the discussion under 1, the opening remarks of the dissenting opinion recognize without question that the majority has sounded the "* * * death knell to the 'de minimis' doctrine in the field of Congressional redistricting * * *." (page 83)

Appellants respectfully submit that this burial of the de minimis doctrine in congressional redistricting deserves, at the very least, the full graveside rites of this court.

3.

Appellees' Motion to Affirm, pages 7 through 9 is principally devoted to paraphrasing questions 3, 4, 5, 6 and 7 of the Questions Presented by Appellants. Appellees dismiss these questions presented as being unsubstantial without even the pretense of thorough discussion. However, Appellants may be somewhat remiss if some comment is not made concerning Appellees' treatment of these questions.

The fifth question presented by Appellants in their Jurisdictional Statement was that the District Court erroneously adopted a principle which limits the legislature to a consideration of population alone in congressional districting and totally excludes any other considerations whatsoever. On Page 8 of the Motion to Affirm, Appellees apparently part company with this rigorous standard of the court below when they concede that at no time during the entire proceedings did they "question the authority of the legislature to consider any factors they may deem desirable in making

districts. Appellees are only interested in the population conforming to constitutional standards." In a like vein, the Appellees earlier conceded the following:

> "Alternative proposed plans, **because of the Legislature's inherent discretion of selection,** could not be the basis of invalidation of an otherwise valid act." (Motion to Affirm, page 5; Emphasis Supplied).

This, rather than attacking the Appellants' contention that the lower court has eliminated any considerations other than population from the legislature's congressional districting effort, it would seem that the Appellees have joined the Appellants in recognizing the relevance and propriety of considerations other than population.

The sixth question presented by Appellants in their Jurisdictional Statement was that certain inaccuracies existed in the Findings of Fact of the lower court, and that such inaccuracies could have influenced the court's conclusion. The Appellees merely note the Appellants' contention as to such inaccuracies without the slightest refutation of the merits of the contention (Motion to Affirm, page 9). Instead, the Appellees merely comment upon the failure of the Appellants to bring such inaccuracies to the attention of the district court in the form of a motion for rehearing. Appellees cite no authority in support of this proposition. Appellants are not required to bring such inaccuracies to the court's attention by motion prior to pursuing an appeal. Furthermore, the lower court's memorandum and order granting a motion to stay pending disposition of the appeal makes it quite clear that the court considered time to be of the essence in this appeal (Appendices to Jurisdictional Statement, pages 102 and 103). The Appellants have so acted in the docketing of this appeal.

The seventh question presented in the Jurisdictional Statement was that the lower court erroneously found the

1967 Missouri Congressional Districting Act invalid under Article I, Section 2, of the United States Constitution, for the reason that the variation in population of the districts therein were minor. In their Motion to Affirm the Appellants contend that this question is unsubstantial because the maximum variation between districts of 25,802 in the 1967 Missouri Act could have been further reduced and accordingly was not "minor" (Motion to Affirm, page 9). Appellants contend that in a state of nearly 4½ million population, divided among ten congressional districts, a maximum variation of 25,000 persons is a minor variation.

Reason dictates that a de minimis standard or a judicial tolerance of minor variations, must apply to congressional reapportionment for the reason that the subject matter, namely population, is never capable of precise measurement. The subject matter is always in a state of change. Of necessity, we are dealing with approximate measures and numbers in motion. Population, like a river, continually flows. It is sometimes high, sometimes low, but always changing. A perfect apportionment would be to accurately measure the population on election day and divide the state into absolutely equal districts on that date. Such a perfect apportionment is, of course, impossible of practical attainment. Any apportionment short of the perfect apportionment will have mathematical differences.

It is recognized that apportionment need not be done more frequently than decennially. Within a period of ten years, there will be considerable change in the population and the apportionment will in all likelihood have considerable mathematical inequalities at the end of the period. Apportioning without recognition of the fact that population continually changes is like buying shoes for a growing boy that fit like a glove. They would be outgrown immediately, and certainly we cannot expect them to be worn for

ten years. In this particular case, it is eight years since the state's foot was last measured. It is self-evident that the 1960 measurement is no longer accurate.

To require perfect apportionment at the beginning of the decennium is unrealistic. To require such eight years later is doubly so. The lower court's rejection of the 1967 Missouri Act because of a maximum population variation of 25,000, or 6 per cent, is a virtual quest for perfect apportionment in a world that does not exist.

Appellants in their Jurisdictional Statement have directed the court's attention to **Connor v. Johnson**, Civil No. 3830, S.D.Miss., September 28, 1966, aff'd 386 U.S. 483 (1967), as authority in support of the constitutionality of the 1967 Missouri Act. Appellees have disputed the weight of this authority. Appellants' thorough discussion of this case and its application to the 1967 Missouri Act as set forth in the Jurisdictional Statement needs no further elaboration. Any further discussion would descend into a "yes it is, no it isn't" type argument. Appellants reiterate their reliance upon the cited case as authority in determination of the case at bar.

Appellants have also cited **Gong v. Kirk**, S.D.Fla., Civil No. 64-143-CIV-EC, aff'd sub nom. **Kirk v. Gong**, Docket No. 872, January 15, 1968, in support of the de minimis variations in populations between the districts in the case at bar. The Florida congressional districts had been established by the lower court and it was discovered that the populations of the districts as calculated by the lower court were substantially inaccurate. Actual population figures calculated by the Bureau of Census reflected that the districts varied in population by 11.83% between the smallest and the largest district. It is significant that Appellees have not controverted the authority of **Gong v. Kirk** in their Motion to Affirm. It is interesting to note that the

inaccurate calculations of population by the Florida court in drawing congressional districts was much worse than the inaccurate population calculations by the 1967 Missouri Legislature. Furthermore, actual population variations according to accurate calculations between the most populated and the least populated Florida districts are far in excess of those reflected in the Missouri districts.

CONCLUSION.

It has been almost four years since this court rendered its landmark decision in **Wesberry v. Sanders** in regard to the constitutional requirements for population equality in congressional districts. Litigation from the lower courts applying the principles of **Wesberry v. Sanders** have reached this court several times during the past four years. The facts and circumstances in these various cases have been such that this court has been able to dispose of the various cases summarily by affirmance or reversal. Out of the many cases in the several states, no lower court, federal or state, has found a congressional redistricting act to be in non-compliance with the population requirements of the Constitution with population variations between districts as minimal as those contained in the Missouri Act. In fact, Appellants have found no decision of a lower court invalidating a congressional redistricting act with population variations double those found in the Missouri Act, either in terms of numbers or in percentage terms.

Appellants have demonstrated in their Jurisdictional Statement and in this brief that the lower court has departed from the principles enunciated by this court and has adopted principles far more stringent than those required by this court or followed by any other lower courts. In effect, wholly new standards have been followed in drawing congressional districts. Instead of applying the law as construed by this court, the lower court has declared entire new principles of law. New principles becoming the law of the land deserve the plenary consideration of this court and should not become firmly embedded into our jurisprudence without the full rationale of and promulgation by this court.

Appellants are firmly convinced by logic and by facts pursuant to the existing principles applicable to congressional redistricting that the 1967 Missouri Act meets the

population requirements of the Constitution. The court's attention is directed to the scholarly and realistic dissenting opinion of the Honorable M. C. Matthes, Judge of the Court Appeals for the Eighth Circuit. The dissent is set forth in Appendices to Jurisdictional Statement, pages 83-95. Appellants consider the dissent to be a lucid and concise statement of the law applicable to this case. Therefore, a reversal of the lower court should follow.

However, if this court agrees with the judgment of the lower court, the far reaching consequences of the new principles announced in the lower court's opinion should not become the law of the land without plenary consideration by this court. The whole question of congressional redistricting has become reduced to such fine mathematical distinctions that the promulgation of further guidelines by this court in the implementation of its opinion in **Wesberry v. Sanders** is required. Legislative bodies which have the responsibility of creating congressional districts are entitled to no less.

It is respectfully submitted that Appellees Motion to Affirm should be denied and the court should enter its order either reversing the judgment of the lower court or noting probable jurisdiction and docketing this case for argument.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

JAMES C. KIRKPATRICK, Secretary of State of Missouri, and NORMAN H. ANDERSON, Attorney General of Missouri,

Appellants,

and

F. V. HEINKEL, R. J. ROSIER, W. W. BECKETT, A. D. SAPPINGTON, L. O. WALLIS, MILLER HERN, HERMAN HETLAGE, HERMAN KERTZ, TURPIN YOUTSEY and GLEN MYERS,

Intervenor-Appellants,

vs.

PAUL W. PREISLER, LOUISE ERBE, BOSTIC J. FRANKLIN, LUCILE RIEDEL, DOROTHY CHILDS, SARAH RIFKIN, and MARTHA LEONARD,

Appellees.

On Appeal from the United States District Court For the Western District of Missouri Central Division.

APPELLANTS' BRIEF ON THE MERITS.

PRELIMINARY STATEMENT.

This is an appeal from the opinion, judgment and decree of the United States District Court for the Western District of Missouri, Central Division, entered on December 29, 1967, decreeing that the 1967 Missouri Congressional Redistricting Act is unconstitutional and void. A three-judge court

was convened to hear this cause and the judgment appealed from was concurred in by two members of the court, viz., the Honorable John W. Oliver, and the Honorable William R. Collinson, Judges of the United States District Court for the Western District of Missouri. The third member of the Court, the Honorable M. C. Matthes, Judge of the United States Court of Appeals for the Eighth Circuit, dissented from this judgment.

OPINION BELOW.

The judgment of the court and the opinion appealed from is reported at 279 F.Supp. 952. The opinion is on file in this court in a printed document entitled Appendices to Jurisdictional Statement. The footnotes are printed in a separate accompanying document. These documents accompanied the Jurisdictional Statement filed by appellants.

The judgment and opinion appealed from are sequels to Preisler v. Secretary of State of Missouri, W.D.Mo. 1965, 238 F.Supp. 187, decided January 4, 1965, and Preisler v. Secretary of State of Missouri, W.D.Mo. 1966, 257 F.Supp. 953, decided August 5, 1966, affirmed sub nom. Kirkpatrick v. Preisler, 385 U.S. 450.

JURISDICTION.

This suit involves the constitutionality of a State statute under Article I, Section 2, of the Constitution of the United States, and was required to be adjudicated by a three-judge court under Sections 2281 and 2284 of Title 28, United States Code. Section 2101 of Title 28, United States Code, requires the Notice of Appeal to be filed within 60 days after the entry of final judgment. The judgment of the District Court, which was entered on December 29, 1967, declared the State statute to be unconstitutional, declared filings for the House of Representatives of the United States Congress pursuant to said statute to be null and void and prohibited appellants from accepting further filings under the statute.

Notice of Appeal was filed in the lower court on January 12, 1968. Rule 13 of this court requires that a Jurisdictional Statement be filed and the case docketed within 60 days from the filing of the Notice of Appeal. The Jurisdictional Statement was filed and the case docketed on February 14, 1968. Probable jurisdiction was noted by this court on March 4, 1968. This brief is filed pursuant to an extension of time by the clerk to May 15, 1968, for filing of appellant's brief. The jurisdiction of the Supreme Court to review this decision by direct appeal in this case is sustained by Wesberry v. Sanders, 374 U.S. 802.

STATUTE INVOLVED.

The judgment and decree appealed from found that the 1967 Missouri Congressional Redistricting Act, Sections 128.203 to 128.302, inclusive, Missouri Revised Statutes, Cumulative Supplement 1967, pages 374 and 375, does not comply with Article I, Section 2, of the Constitution of the United States, and is therefore, unconstitutional and void. The 1967 Missouri Congressional Redistricting Act is set forth in Appendices to Jurisdictional Statement as Appendix F.

QUESTIONS PRESENTED.

I.

The opinion, decision and judgment appealed from erroneously found that the 1967 Missouri Congressional Redistricting Act, House Substitute for Senate Committee Substitute for Senate Bill No. 182, 74th General Assembly of the State of Missouri, does not comply with Article I, Section 2, Constitution of the United States, and is unconstitutional and void. Population was the principal factor considered by the legislature in enacting this law, and the minor variations in the populations of the resulting congressional districts fully comply with the constitutional requirement that as nearly as is practicable one man's vote in

a congressional election is to be worth as much as another's. The 1967 Missouri Congressional Redistricting Act complies with Article I, Section 2, Constitution of the United States, is in harmony with all applicable constitutional principles and is valid.

2.

The opinion, decision and judgment appealed from erroneously construed Article I, Section 2, Constitution of the United States, and Wesberry v. Sanders, 376 U.S. 1 (1964), by finding that congressional districts are not as equal in population as practicable if any other plan proposed to the legislature or to the court can result in districts with smaller population variations.

3.

The opinion, decision and judgment appealed from erroneously construed Article I, Section 2, Constitution of the United States, and prior decisions of this court by holding that population variations between congressional districts which are de minimis are constitutionally impermissible; and by holding that minor variations in the population of congressional districts are constitutionally impermissible in the absence of competent and substantial evidence justifying the variations.

4.

The opinion, decision and judgment appealed from is erroneous and in conflict with prior decisions of this court in holding that in establishing congressional districts no allowance can be made for legislative interplay and that any population deviations from absolute mathematical equality between congressional districts attributable to political compromise within the state legislature is arbitrary and discriminatory and invalidates such legislation. The opinion renders nugatory considerations other than population which

may be recognized by the legislature in drawing congressional districts as provided by prior decisions of this court.

5.

The opinion, decision and judgment appealed from is based upon conclusions which result from a multitude of inaccuracies, irrelevancies and distortions in the findings of fact. For example: the court erroneously found that the Missouri Legislature at no time considered accurate 1960 census figures; the court erroneously found that "better plans were in fact presented to but rejected by Missouri legislators"; the court distorted the testimony of legislative leaders; the court relied upon post-hearing information from unknown sources to discredit appellants' evidence in regard to areas of the state with growing population; the court erroneously assumes that rural voters and urban voters must be segregated in congressional districting; and many more.

STATEMENT OF THE CASE.

1.

BACKGROUND

As a result of the United States Census of 1960, the number of members to which the State of Missouri was entitled in the House of Representatives in the United States Congress was reduced from 11 to 10. In 1961 the Legislature of the State of Missouri by law divided the state into ten congressional districts for the election of members to the House of Representatives. Following this court's decision in **Wesberry v. Sanders**, 376 U.S. 1 (1964), the constitutionality of the 1961 Missouri Congressional Redistricting Act became the subject of a civil suit in the United States District Court for the Western District of Missouri. If districts which were absolutely equal in population were established, each district would contain one-tenth of the population of the state or 431,981.3 people. Under the 1961 Act the largest

district had a population of 506,854 or a population of 74,873 in excess of a mathematically ideal district. The smallest district had a population of 378,499 or a population of 53,482 less than a mathematically ideal district. The largest district had a population of 128,355 in excess of the population of the smallest district. In a decision rendered on January 4, 1965, the court found that the 1961 Act did not meet the requirements of Article I, Section 2, of the Constitution and was void. **Preisler, et al. v. Secretary of State of Missouri, et al.**, 238 F.Supp. 187,

In 1965 the Legislature of the State of Missouri enacted a new congressional redistricting law. Under the 1965 Congressional Redistricting Act the population of the largest district was 474,985 or 42,914 persons in excess of a mathematically ideal district. The population of the smallest district was 390,240 or 41,741 persons less than a mathematically ideal district. The largest district had a population of 84,655 in excess of the population of the smallest district. The constitutionality of the 1961 Act became the subject of a civil suit in the United States District Court for the Western District of Missouri in **Preisler, et al. v. The Secretary of State of Missouri, et al.**, 257 F.Supp. 953. The court found that the 1965 Act did not meet the requirements of Article I, Section 2, of the Constitution and was therefore void. Upon appeal to this court the judgment of the lower court was affirmed in **Kirkpatrick v. Preisler**, 385 U.S. 450.

In **Preisler v. Secretary of State**, 257 F.Supp. 953, the court retained jurisdiction for the purpose of the court's future consideration of the constitutionality of any subsequent legislation relating to congressional redistricting that might in the future become the law of Missouri. Upon the 1967 Congressional Redistricting Act becoming law, appellants filed a motion with the court seeking approval of the 1967 Act and seeking termination of the proceedings.

After hearings held on the motion and after consideration of briefs filed, the court, by a two to one decision, held that the 1967 Act does not comply with the requirements of Article I, Section 2, Constitution of the United States, and is void. This appeal is taken from that decision.

2.
THE 1967 ACT.

In 1967 the 74th General Assembly of the State of Missouri once again engaged in the task of drawing ten congressional districts for the state. At least sixteen different congressional redistricting plans were considered by the legislature. The first Bill was introduced on January 18, 1967. After considering the many plans before it, legislative deliberation had resolved itself down to two plans, and a Bill was enacted on June 27, 1967 (Stip. Ex. 11, p. 17). The final enactment came after a deadlock had been broken between the two Houses of the Legislature upon the submission of a House substitute for the Senate Bill by the Majority Leader of the House of Representatives.

The 1960 United States census population figures were the starting point for the General Assembly in its legislative deliberations concerning congressional redistricting. The author of the Bill had been Chairman of the Senate Committee on Reapportionment for a number of years. After the census was reported in 1961 Senator Avery personally prepared a map of the State of Missouri by counties in which he inserted the population of each county from the 1960 federal census (A. 118). He testified that this map was the basic tool for him in drafting the Bill which, after substantial amendment, was finally enacted (A. 119, Deposition Ex. A). He further testified that he appointed subcommittees to obtain accurate population figures for the current political subdivisions of the St. Louis and Kansas City urban areas (A. 111). Senator Young, a member of the sub-

committee from the St. Louis area, obtained from the Census Bureau the 1960 census data for political subdivisions in St. Louis City (A. 112, 121, Stip. Ex. 18). Ward populations based on the 1960 census were furnished to the committee by the Board of Election Commissioners of the City of St. Louis (A. 112). Senator Young also furnished to the committee data prepared by the Census Bureau reflecting the population for townships in St. Louis County (A. 112 & 123, Stip. Ex. 23). Other evidence in the record reflecting the use of census data for the St. Louis area by the General Assembly is as follows: Stip. Ex. 16—Map of St. Louis by ward and precinct boundaries, 1966, Board of Election Commissioners for the City of St. Louis, showing 1960 population for each ward; Stip. Ex. 20—Map of townships, St. Louis County, Missouri, St. Louis County Planning Commission, 1965, showing 1960 population for each township Deposition Exhibits B and D, A. 4, 113, 122, 123, 129. Senator Ryan furnished to the committee a map of Kansas City showing estimated 1960 populations for each current ward (A. 112). This map had been prepared by the Board of Election Commissioners of the City of Kansas City (A. 115-116 and Deposition Ex. C). Further evidence of the use of 1960 census data in the Kansas City area by the General Assembly is Ex. 27—Jackson County Street Map, Copyright—Gallup Map and Stationery Company, showing 1960 township populations. The 1960 census figures were adhered to constantly in the consideration of the many plans before the General Assembly up to and including the final enactment of the 1967 Act.

The accurate application of 1960 census figures to proposed districts in the metropolitan areas of Kansas City, St. Louis and St. Louis County involved a number of difficulties. Ward lines and precinct lines in the cities of Kansas City and St. Louis had been changed subsequent to the 1960

census (A. 75-76, 110). Annexations had been made to Kansas City subsequent to the 1960 census (Stip. Ex. 28). Township lines and precinct lines had been changed in the County of St. Louis subsequent to the 1960 census. Entire new townships had been created in St. Louis County increasing the total number of townships and the total number of precincts (Stip. Ex. 24, A. 48-49). Relating 1960 census data to the new ward, township and precinct boundaries in these areas was a task to which the occurrence of some errors was almost inevitable. Population data for the new Kansas City wards was submitted by the local election officials admittedly as estimated data (A. 115-116).

Supporters of the Bill which was finally enacted informed the members of the legislature that the populations of the various districts were as follows (Appendices to Jurisdictional Statement 3; 279 F.Supp. l.c. 956): (Appellants have added to the tabulation the population variations from an ideal district of 431,981, together with the per cent of such variation.)

Congressional District	Population	Variation from Ideal	Per cent of Variation
1	436,417	+ 4,436	+1.06%
2	442,302	+10,321	+2.39%
3	431,507	— 474	—0.11%
4	423,815	— 8,166	—1.89%
5	430,412	— 1,569	—0.36%
6	425,238	— 6,743	—1.56%
7	436,769	+ 4,788	+1.10%
8	439,984	+ 8,003	+1.85%
9	428,223	— 3,758	—0.87%
10	423,866	— 8,115	—1.88%

According to these population figures the largest district (No. 2) has a population of 18,487 in excess of the smallest district (No. 4), with a resulting ratio of largest district to smallest district of 1.04.

After the commencement of this litigation, it was discovered that population totals for the districts were inaccurately calculated by the sponsors of the compromise Bill. Correct

population figures were obtained from the Bureau of Census with the agreement of all parties to the case. The correct population figures for these congressional districts and the variation is set out below (Appendices to Jurisdictional Statement 3; 279 F.Supp. l.c. 956).

Congressional District	Population	Variation from Ideal	Per cent of Variation
1	439,746	+ 7,765	+1.79%
2	436,448	+ 4,467	+1.03%
3	436,099	+ 4,118	+0.95%
4	419,721	−12,260	−2.83%
5	431,178	− 803	−0.18%
6	422,238	− 9,743	−2.25%
7	436,769	+ 4,788	+1.10%
8	445,523	+13,542	+3.13%
9	428,223	− 3,758	−0.86%
10	423,868	− 8,113	−1.87%

The largest district (No. 8) has a population of 25,802 in excess of the smallest district (No. 4) with a resulting ratio of largest district to smallest district of 1.06.

Thus, although the 1960 U.S. Census figures were the data which was employed in the consideration of congressional redistricting legislation by the Missouri Legislature, inaccurate last minute calculations caused the legislature to believe that the populations of the congressional districts in the enacted Bill varied from an ideal district by a slightly lesser number of people than is actually reflected by correct calculations based upon the 1960 census. The state total discrepancy was 1,280 below the correct figure (A. 16). The evidence demonstrates the likelihood of the error in calculations to have occurred during the preparation of the House Substitute for Senate Committee Substitute for Senate Bill No. 182 on the weekend prior to its enactment. The testimony of both the Majority and Minority Leaders in the House of Representatives of the General Assembly so indicates (A. 67 and 96).

The uncontradicted testimony before the court by the legislative leaders from both parties for both Houses was

that the legislative deliberations in considering congressional redistricting during the 1967 session had been based upon population (A. 72, 82, 92, 97, 116 & 125).

Senator Avery testified that equalizing the population of the various districts was the principal goal of his committee. The next consideration of the committee was to make the districts as compact and as regular as was feasible (A. 116). He referred specifically to the establishment of Districts 8 and 10 insofar as Dent County is concerned. The population of the districts could have been made more equal if Dent County had been placed in the 10th District rather than in the 8th District. However, Dent County was placed in the 8th District in order to make this district more compact. In doing so it was the committee's judgment that the principle of population equality had not been sacrificed (A. 117). In his words "* * * the consideration of regular lines was as important as that of population, where it was within reason and we felt that 2% one way or another was within reason" (A. 117, see also A. 125). The Majority Leader of the House who sponsored the substitute bill which was finally enacted testified that the legislature "* * * wanted the districts to be as compact as possible, not try and string them out across the State * * *" (A. 72). The Majority Leader of the Senate testified that recognition was given to the compactness of districts in the legislative consideration (A. 83). The Minority Leader of the Senate testified that consideration was given to compactness (A. 92). Senator Waters, the Majority Leader of the Senate testified that recognition was given by the legislature to historical factors reflected in establishing these congressional districts. He stated as follows:

> "* * * I can cite one for example, that Ray County in my district has always been in the Sixth District, or whatever district represented northwest Missouri. They

wanted to stay there. They were leaning on me to try to get them to stay there, and quite naturally I was aware and took cognizance of this historical factor in trying to keep them up there so long as we could come up with something which reached the standards of the population" (A. 83 and 84).

Recognition of the historical factor by the legislature is reflected by the testimony of the Majority Leader of the House, (A. 72) and by the Chairman of the Senate Reapportionment Committee (A. 116). The effort of the legislature to avoid splitting county lines is reflected in the testimony of the Majority Leader of the House as follows:

"* * * another thing I should interject here, another very important thing, I think; we tried not to break up rural county lines. We tried to keep the county line or the county out in the rural areas. We did split up St. Louis County, St. Louis City and Jackson County. I think those are the only areas. So we tried not to break up the county lines, and we tried to, if possible, stick to historical useage of these counties in districts; in other words, if a certain county had historically been in a district with other counties over the years, we tried to leave it in that county if possible, if it didn't throw the population off" (A. 72 and 73).

Similar testimony was given by the Chairman of the Senate Reapportionment Committee (A. 119) who also stressed the importance of keeping entire counties in the same congressional district in order to prevent the disruption of the election process (A. 119 and 120). The witnesses stated the problem as follows:

"Well, one reason would be that it would be disrupting to the election processes in the county. But the main reason was that we just felt it was not, that our popula-

tions could be divided within a range of a couple of degrees one way or the other, and the other, not disturb the counties and the people in the counties by being divided."

In the creation of two of the smallest districts (No. 4 and No. 6) consideration was given to the factor that areas in these districts were growing rapidly in population (A. 82 and A. 86).

In the creation of the largest district (No. 8) consideration was given to a large number of transitory, nonresident and hence nonvoting people located within the boundaries of the district (Fort Leonard Wood, a large U.S. Military Reservation, the University of Missouri at Columbia and Rolla, and the State Capitol at Jefferson City) (A. 75, 82, 83, 86, 87, 88, and 98).

All of the legislative witnesses discussed the practical legislative difficulties in reaching agreement on any congressional legislation. The lower House of the Missouri Legislature is composed of 163 members and the upper House is composed of 34 members (A. 117). Any piece of legislation requires the vote of 82 members in the lower House and 18 in the upper House. The difficulties inherent in the enactment of congressional redistricting legislation is demonstrated by the testimony of the Majority Leader of the House as follows:

"* * * in other words, I could have probably got these within two or three voters, maybe, if we used a computer or something like that, but this would never pass the Legislature. We are dealing with men, and these men represent people at home, and I think they have to follow these people's wishes, so we had to try to adopt a plan that could get 82 votes in the House and 18 votes in the Senate."

The problem was stated by the Chairman of the Senate Reapportionment Committee as follows:

> "I might say it's mighty easy to sit before the fireside and divide this state, and either one of us could do it very much better than this is done perhaps, but when you got 163 members of the House and 34 members of the Senate and everybody having equal privilege, right to consider a redistricting, it soon gets away from one man's thought about the state and how it should be districted" (A. 117).

All of the experienced legislative leaders from both parties testified that the act under review was a reasonable legislative compromise (A. 76, 77, 85, 93, 96, and 125).

Following the enactment of the 1967 Act Senator Young filed a constitutional objection to the signing of House Substitute for Senate Committee Substitute for Senate Bill No. 182 on the grounds that the Bill did not meet the requirements of Article III, Section 45, of the Missouri Constitution that congressional districts be ". . . as nearly equal in population as may be," and that the Bill did not comply with the decision of the United States District Court on August 5, 1966. It is noted that Senator Young had sponsored a Bill in the Senate which would have created districts ranging in population from 440,252 to 417,399 populations variations in excess of those in the enacted Bill (Stip. Ex. 1). A similar objection was filed in the House of Representatives by Representatives Meyer, Mulvaney, Schlef and Walsh. Excessive population in the 2nd district was claimed (Stip. Ex. 11, pp. 18-19; R. 59). It is noted that all four of these Representatives voted for the Bill which was enacted (Stip. Ex. 11, p. 13).

3.

LEGISLATIVE HISTORY OF THE 1967 ACT.

On January 26, 1967, there was introduced in the 74th

General Assembly of Missouri, Senate Bill No. 182 by State Senator Omer Avery, such bill being entitled An Act Relating to Congressional Districts. The Bill was read for the first time on this date, and on January 30, 1967, it was read for the second time and referred to the Committee on Apportionment (Stip. Ex. 11, p. 1; R. 59). As introduced, Senate Bill No. 182 contained congressional districts with populations ranging from a high of 448,824 and a low of 423,-103 (Stip. Ex. 5; R. 59). On March 21, 1967, Senator Avery, the Chairman for the Committee on Apportionment, reported to the Senate that after consideration of Senate Bill No. 182 the committee had recommended that Senate Committee Substitute thereto do pass. This Senate Committee Substitute to Senate Bill No. 182 reflected congressional districts varying from a high population of 446,965 to a low population of 423,868 (Stip. Ex. 6; R. 59). On March 23, 1967, the Senate Committee Substitute was taken up for perfection on the Floor of the Senate, and Senator Avery offered Senate Amendment No. 1 thereto, which was read (Stip. Ex. 11, p. 2; R. 59). Thereafter, on April 4, 1967, Senate Bill No. 182, with Senate Committee Substitute for Senate Amendment No. 1, pending, was called from the informal calendar and was again taken up for perfection. A Senate Substitute Amendment for Senate Amendment No. 1, was offered by Senator Vanlandingham and was adopted by a vote of 20 Yeas, 12 Nays and 2 Absents. On the same date Senator Johnson offered his Senate Substitute for Senate Bill No. 182, with population variances of 440,371 and 426,603, but no vote thereon was then taken (Stip. Ex. 11, p. 3; R. 59). On April 5, 1967, Senate Bill No. 182, with Senate Committee Substitute and Senate Substitute pending, was called from the informal calendar and again taken up for perfection. At this time perfecting amendments to the Senate Substitute were offered by Senators Waters, Johnson, and Cox, and adopted and still another perfecting

amendment to the Senate Substitute offered by Senator Lee was defeated (Stip. Ex. 11, p. 5; R. 59). At a night session on April 5, 1967, a perfecting amendment to the Senate Substitute offered by Senator Johnson was defeated as was the Senate Substitute itself. The Senate Substitute for Senate Bill No. 182 as it was amended contained population variances ranging from a high district of 447,395 and a low district of 410,528 (Stip. Ex. 8; R. 59). Senator Avery thereafter moved that Senate Committee Substitute for Senate Bill No. 182 as amended be adopted. Said motion was carried and the Senate Committee Substitute was declared perfected and ordered printed. On April 13, 1967, the Senate Committee Substitute as perfected was read for the third time in the Senate and passed by the vote of 28 Yeas, 5 Nays and 1 Absent. The President of the Senate declared the Bill passed. As passed by the Senate, [Perfected] Senate Committee Substitute for Senate Bill No. 182 outlined congressional districts containing a high population of 444,071 and a low population of 423,868 (Stip. Ex. 7; R. 59).

Thereafter, [Perfected] Senate Committee Substitute for Senate Bill No. 182 was received by the House of Representatives and after being read for the second time on April 26, 1967, was referred to the House Committee on Congressional Redistricting. On June 7, 1967, the Chairman of the House Committee on Congressional Redistricting submitted his report to the House assembled, said report being that the committee recommended its House Committee Substitute to Senate Committee Substitute for Senate Bill 182 do pass. This House Committee Substitute contained congressional districts varying from a high population of 444,390 to a low population of 418,325 (Stip. Ex. 9, R. 59). On June 14, 1967, the House Committee Substitute was considered by the House and upon vote was defeated with 53

Representatives voting for the Bill, 108 Representatives voting against the Bill, one Representative not voting, and 1 Representative absent. The Senate Committee Substitute for Senate Bill No. 182 was then considered by the House, amendments thereto were offered by Representatives Volkmer, Hibler, Kennedy, Schapeler, and Dale, and all of said amendments were defeated upon a roll call vote of the House, the closest such vote being 73 for, 87 against (Stip. Ex. 11, p. 9; R. 59). A sixth amendment was offered by Representative Sponsler but was not voted upon that date and was subsequently withdrawn by Representative Sponsler on June 19, 1967 (Stip. Ex. 11, p. 11; R. 59).

On this same date, June 19, 1967, the House took up Senate Committee Substitute for Senate Bill No. 182 as a special order of business and Representative Rabbitt, the Majority Floor Leader, offered House Substitute for Senate Committee Substitute for Senate Bill No. 182. This House Substitute, upon vote, was adopted with 82 Representatives voting for the Bill, 80 Representatives voting against the Bill, and 1 Representative absent. The House Substitute was read for the third time and was passed upon roll call vote with 84 Ayes, 76 Noes, 1 present but not voting, and 2 absent. The Speaker of the House declared House Substitute for Senate Committee Substitute for Senate Bill No. 182 passed (Stip. Ex. 11, pp. 13-14; R. 59). Said House Substitute was formulated by an informal committee of Representatives and while incorporating substantially all of the House amendments which had been previously defeated on the Floor of the House, it also adhered closely to the [Perfected] Senate Committee Substitute for Senate Bill No. 182 as agreed upon by the Senate (A. 64-65). This House Substitute was subsequently enacted by the General Assembly and according to its sponsors it contained population variances from a high district of 442,302 to a low district of 423,815 (Ex. HD A, A. 71).

On June 22, 1967, the Senate took up for consideration the House Substitute for Senate Committee Substitute for Senate Bill No. 182 and Senator Young offered his Senate Substitute (S.B. No. 107) for the House Substitute (Stip. Ex. 1). After an objection to this Senate Substitute as being out of order was overruled, it was voted upon and defeated by the Senate with 8 Senators voting Yea and 26 Senators voting Nay (Stip. Ex. 11, p. 15; R. 59). Said Senate Substitute as drawn by Senator Young, contained congressional districts that varied from a high population of 444,252 to a low population of 417,399 (Stip. Ex. 1, R. 59). Thereupon, following a recess, House Substitute for Senate Committee Substitute for Senate Bill No. 182, was voted upon and defeated with 11 Yeas, 19 Nays, and 4 Absents (Stip. Ex. 11, p. 15; R. 59). A Senate motion that the House be requested to recede from its position on the House Substitute was adopted, but on June 27, 1967, the House upon roll call vote refused to so recede; 104 Representatives voting Aye, 57 Representatives voting No on the refusal, 2 Representatives being absent (Stip. Ex. 11, p. 16; R. 59). Upon being informed of the refusal of the House to recede from its House Substitute for Senate Committee Substitute for Senate Bill No. 182, the Senate on July 27, 1967, during an evening session again voted on the House Substitute and adopted same by a vote of 30 Yeas, 3 Nays and 4 Absences (Stip. Ex. 11, p. 17; R. 59). The House Substitute for Senate Committee Substitute for Senate Bill No. 182 was thereupon read for the third time and passed upon a vote of 29 Yeas, 3 Nays, 2 Absences, and was declared passed by the President of the Senate.

OTHER PROPOSED BILLS.

Other Bills offered in the 74th General Assembly relating to congressional redistricting and not already alluded to were the following:

House Bill No. 870, was offered by Representative Belt on March 16, 1967, read for the first time on that date, read for the second time on March 20 and on March 22 it was referred to the Committee on Congressional Redistricting where it remained for the duration of the session (Stip. Ex. 4; R. 59). This proposed Bill contained four whole-county congressional Districts ranging in population from 438,733 to 427,972. The urban districts therein are of indeterminate population (Stip. Ex. 4, R. 59).

On February 9, 1967, Representative Dill and others introduced House Bill No. 399, which was read for the first time on that date, on the second time on February 13, and on February 15 it was referred to the Committee on Congressional Redistricting, where it remained for the duration of the session. An examination of the districts discloses that in many instances districts are described by highways, railroad lines, river channels and city streets. Defendants have been unable to verify population figures in such districts. Only the populations of the four rural districts can be computed in this Bill, and these vary from a most populated of 434,111 to a least populated of 427,290. The six urban districts in the Bill contain such fragmentation of wards and townships that their populations cannot be calculated. However, it should be noted that in this proposed Bill, Ward 21 of the City of Kansas City, containing a population of 35,168 was placed in both the 4th and 6th Districts (Stip. Ex. 2; R. 59).

House Bill No. 449 was introduced by Representative Troupe and others and read for the first time on February 15, 1967, for the second time on February 16, and on February 23 it was referred to the Committee on Congressional Redistricting where it remained for the duration of the session. House Bill 449 contained four whole-county congressional districts ranging in population from a high of

443,816 to a low of 421,616. Its urban district populations cannot be ascertained (Stip. Ex. 3; R. 59).

A description and chronology of congressional redistricting Bills considered is tabulated as follows:

CONGRESSIONAL REDISTRICTING BILLS INTRODUCED BUT NOT ENACTED: 74TH GENERAL ASSEMBLY OF MISSOURI

Bill & Sponsor	Date Introduced	Most Populated Dist.	Least Populated Dist.
SB No. 107 Senator Young*	Jan. 18, 1967 June 22, 1967	6th—444,252	7th—417,399
SB No. 182 Senator Avery	Jan. 26, 1967	3rd—448,824	7th—423,103
HB No. 399 Rep. Dill*	Feb. 9, 1967	10th—434,110	6th—427,290
HB No. 449* Rep. Troupe, et al	Feb. 15, 1967	8th—443,816	7th—421,616
HB No. 870* Rep. Belt, et al	March 16, 1967	10th—438,773	7th—427,972
SCS SB 182 Sen. Avery	March 21, 1967	3rd—446,965	10th—423,868
SCS SB 182 (Perfected) Sen. Vanlandingham	April 4, 1967	1st—444,071	10th—423,868
SS SB No. 182 Sen. Johnson*	April 4, 1967	5th—440,371	4th—426,603
Perfecting Amendments SSSB No. 182 Senators Waters, Johnson & Cox	April 5, 1967	6th—447,395	4th—410,528
HCS, SCS, SB 182 Rep. Copeland	June 7, 1967	10th—444,390	4th—418,325
HA No. 1, SCS, SB No. 182 Rep. Volkmer	June 14, 1967	1st—444,071	2nd—425,527
HA No. 2, SCS SB No. 182 Rep. Hibler	June 14, 1967	1st—444,071	4th—419,720
HA No. 3, SCS SB No. 182 Rep. Kennedy	June 14, 1967	1st—444,071	7th—417,399
HA No. 4 SCS SB No. 182 Rep. Schapeler	June 14, 1967	1st—444,071	4th—421,955
HA No. 5 SCS SB No. 182 Rep. Dale	June 14, 1967	1st—444,071	10th—423,868

*Table considers only whole-county districts with ascertainable populations.

ARGUMENT.

1.

The opinion, decision and judgment appealed from erroneously found that the 1967 Missouri Congressional Redistricting Act, House Substitute for Senate Committee Substitute for Senate Bill No. 182, 74th General Assembly of the State of Missouri, does not comply with Article I, Section 2, Constitution of the United States, and is unconstitutional and void. Population was the principal factor considered by the legislature in enacting this law, and the minor variations in the populations of the resulting congressional districts fully comply with the constitutional requirement that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's. The 1967 Missouri Congressional Redistricting Act complies with Article 1, Section 2, Constitution of the United States, is in harmony with all applicable constitutional principles and is valid.

In **Wesberry v. Sanders**, supra, this court construed Article I, Section 2, of the Constitution of the United States, to require "* * * that as nearly as is practicable, one man's vote in a congressional election is to be worth as much as another's * * *". As a result of this landmark decision, the statute creating congressional districts in the State of Missouri was contested as to its constitutional validity in the United States District Court for the Western District of Missouri. The largest district had a population of 128,355 in excess of the population of the smallest district. Although this population disparity in congressional districts was far less than the population disparity in congressional districts in many of the several states, it was obvious that the act creating the districts did not meet the population requirements of the constitution and the act was invalidated.

It is the tradition of the State of Missouri to respect and not deny the law of the land. In 1965 the legislature of the

State of Missouri attempted to enact a law establishing congressional districts which would comply with the population requirements of the constitution. At that time the notion was in vogue that congressional districts which would not vary from an average mathematical ideal district by more than 10% were constitutionally permissible. The 1965 act created districts in which the population of the largest district and the population of the smallest district varied from the population of an ideal district by slightly less than 10%. This act was invalidated by the United States District Court and the judgment of the lower court was affirmed by this court. The efforts of the Missouri Legislature in 1965 resulted from a misconception of the law rather than from any deliberate attempt to see how far it was permissible to stray from strict mathematical equality in congressional districts.

In 1967 the Missouri Legislature again undertook the task of enacting legislation creating congressional districts which would comply with the population requirements of the Constitution of the United States. The evidence reflects that population equality among the congressional districts was the fundamental goal of the legislature in its deliberations. In working towards this goal of population equality in the districts, the legislature utilized the 1960 census figures for the State of Missouri and for its political subdivisions.

Although population equality among the various districts was the fundamental goal of the legislature, recognition was given to other considerations. The State of Missouri is constituted by 114 counties and the City of St. Louis. In 1960 the City of St. Louis had a population in excess of 700,000, St. Louis County had a population in excess of 700,000 and Jackson County, which includes most of the City of Kansas City, had a population in excess of 600,000.

In drawing congressional districts, the legislature recognized the integrity of counties throughout the state with the exception of the City of St. Louis, St. Louis County, and Jackson County. Thus counties were not split by the congressional districts with the exception of the three metropolitan political subdivisions referred to tbove.

Article III Section 45 of the Missouri Constitution provides that congressional districts should be compact and contiguous in area. In enacting the 1967 act, the Missouri Legislature tried to give effect to this provision of the Missouri Constitution and recognition was given to compactness and contiguity in establishing the districts. Certain counties and certain communities historically and traditionally share political and social interests. Such communities and such counties had a common interest in being within the same congressional district. In enacting the 1967 law, the legislature gave some recognition to these historical and traditional interests.

The end product of the legislative efforts was a law creating congressional districts which the members of the legislature believed varied in population from a mathematically ideal district by 10,321 people in excess of an ideal district and 8,166 people less than an ideal district. The population of the largest district would have been 2.39% in excess of an ideal district and the population of the smallest district would have been 1.89% less than an ideal district. The population of the largest district would have been 18,487 in excess of the smallest district with a resulting ratio of the largest district to smallest district of 1.04.

The lower House of the legislature is composed of 163 members and the upper House is composed of 34 members (A. 117). At least 16 separate congressional redistricting plans had been considered from January 18, 1967 through

June 27, 1967. Many committee meetings had been held and amendments had been offered, some of which were adopted, some of which were defeated. Extensive legislative consideration had been given to this subject matter. In the course of this extensive legislative process inaccuracies in the population calculations of the proposed districts had arisen. These inaccuracies are admitted by everyone involved in this case to be innocent and in no way intended. (However the lower court insinuates that the inaccuracies may have been willful and prompted by some sinister motivations.) (Footnotes to Appendices to Jurisdictional Statement, p. 17, 279 F.Supp. l.c. 956)

After the commencement of the litigation, the inaccuracies referred to above were discovered. The correct population figures as furnished by the Bureau of Census reflected that the largest district had a population of 13,542 in excess of an ideal district and the smallest district had a population of 12,260 less than an ideal district. The largest district had a population of 3.13% in excess of ideal and the smallest district had a population of 2.83% less than ideal. The population of the largest district exceeded that of the smallest district by 25,802 with a resulting ratio of the largest to smallest district of 1.06.

Appellants contend that these congressional districts comply with the population requirements of Article I, Section 2 of the Constitution. It is the intention of the Constitution to protect the voter and to permit the voter to have an equal voice in the selection of his congressmen with all other voters. Absolute equality to any voter with all other voters in the selection of congressmen is recognized to be a standard impossible of achievement. Thus voters in all congressional districts throughout the United States exercise the right to elect members of Congress with varying degrees of equality. In measuring the right of a voter to

choose a member of Congress in relation to the rights of other voters to elect other members in Congress, the question becomes whether or not one voter's right has been unconstitutionally diluted in favor of other voters' rights. Congressional districts have no rights, constitutionallly or otherwise. Thus the fact that one congressional district may have 10,000 more people or 25,000 more people than another congressional district is not in and of itself significant or controlling in a determination of voting rights. The weight of a person's vote in the larger district in relation to the weight of a person's vote in the smaller district is the significant question. Therefore, numbers alone can be misleading. The dilution of the vote in the larger district can be expressed with meaning in terms of percentage or ratio rather than in terms of whole numbers. The right to vote guaranteed by the Constitution is not violated unless the dilution is significant.

Thus, in exercising judgment as to whether or not a citizen's right to vote has been unconstituionally diluted ultimately a point of rather sophisticated refinement is reached. If a larger district has twice as many voters as a smaller district, it is obvious that the right to vote in the larger district has been diluted 2 to 1. If the larger district has half again as many voters as the smaller district, the dilution of the vote in the larger district is 1.5 to 1. In the 1965 Missouri Congressional Redistricting Act the larger district exceeded the population of the smaller district by 20%. This vote dilution in the larger district in relation to the smaller district of 1.2 to 1 was found by the lower court to be unconstitutional, and this decision was upheld by this court in **Kirkpatrick v. Preisler**, supra.

In recognition that population equality among congressional districts cannot be achieved (or more to the point, equal number of voters among congressional districts) the

task at hand is to determine at what point unconstitutional and unlawful voter dilution occurs among congressional districts unequal in population. Although this question is not subject to mathematical measurement, it must of necessity be examined from the point of view as to what departure from an absolute 1 to 1 ratio is constitutionally permissible. It is proper to examine the question in its mathematical terms and to relate the question in its mathematical terms, together with all of the accompanying facts, circumstances and considerations, and to reach a conclusion based upon the common experience of man as to whether or not voting rights have been unlawfully infringed upon. An examination of the departures from a 1 to 1 ratio which have been found by this court to violate the Constitution, together with an examination of the departures from a 1 to 1 ratio which have been approved by this court as meeting the requirements of the Constitution, is relevant to a constitutional judgment in regard to the 1967 Missouri Act.

The good faith efforts of the Missouri Legislature resulted in districts believed by the legislature to produce extremes in the population of districts of 1.04 to 1. The results in fact were population differences of 1.06 to 1. An examination of the decisions of this court discloses that a finding by the lower court that an act was unconstitutional in which the population ratio of the largest district to the smallest district was approximately 1.2 to 1 was affirmed; **Kirkpatrick v. Preisler**, supra. In addition, this court reversed a lower court which had upheld the validity of a congressional redistricting act in which the ratio of the largest district to the smallest district was approximately 1.2 to 1; **Duddleston v. Grills**, (Ind.) 385 U.S. 455. Appellants do not find any case before this court in which the court has invalidated congressional districts with a ratio of less than 1.2 to 1 between the largest and smallest dis-

tricts. Subsequent to **Kirkpatrick v. Preisler**, supra and **Duddleston v. Grills**, supra, cases were before the court in which ratios in excess of 1.2 to 1 were held to be constitutionally impermissible, e.g., **Rockefeller v. Wells**, (N.Y.) 389 U.S. 421, approximately 1.30 to 1; and **Lucas v. Rhodes**, (Ohio) 389 U.S. 212, approximately 1.35 to 1.

On the other hand several cases have been before the court in which the population inequality of congressional districts has been found to be constitutionally permissible. In **Kirk v. Gong**, — U.S. —, 19 L.Ed.2d 784, congressional districts for the State of Florida which were established by the lower court were found to be constitutionally permissible. The population of the districts as calculated by the court had a ratio of approximately 1.02 to 1 between the largest and the smallest district. However, the court's calculations were inaccurate, and correct calculations by the Census Bureau reflected a ratio of approximately 1.12 to 1. In **Alton v. Tawes**, 384 U.S. 315, districts created by the court with a ratio of approximately 1.025 to 1 were found to be constitutionally permissible. In **Dinis v. Volpe**, — U.S. —, 19 L.Ed.2d 785, congressional districts with a ratio of approximately 1.02 to 1 were found to be constitutionally permissible. In **Connor v. Johnson**, 386 U.S. 483, congressional districts with a ratio of approximately 1.06 to 1 were found to be constitutionally permissible.

It is noted that the highest ratio between congressional districts which has been found to be constitutionally permissible by this court is 1.06 to 1 (with the exception of **Gong v. Kirk**, ratio 1.12 to 1, discussed below). The lowest ratio found to be constitutionally impermissible by this court is 1.2 to 1. Although all of these cases have been summarily decided by the court, it appears to appellants that this court has approved population inequalities among congressional districts in the approximate ratio of 1.06 to 1.

Thus, Missouri with an intended population ratio of 1.04 to 1 and an actual population of 1.06 to 1 between the largest and smallest district meets the apparent requirements of this court.

As has been demonstrated above, one congressional redistricting case has been affirmed by this court in which the population ratio between the largest and smallest district of 1.06 to 1 is identical with the ratio between the Missouri districts, **Connor v. Johnson**, supra. The actual population difference between the largest and smallest district in that Mississippi case was 26,265. In Missouri the intended population difference was 18,487, and the actual population difference was 25,802 or less than in Mississippi. Furthermore, in **Gong v. Kirk**, supra, this court approved congressional districts in the State of Florida drawn by the lower court with an intended population difference between the largest and smallest district of 8,027, but with an actual population difference of 48,824. Thus, the population difference in the Florida districts is almost twice as much as in the Missouri districts. These two cases are a forceful demonstration that the 1967 Missouri Congressional Redistricting Act meets the population requirements of Article I, Section 2, Constitution of the United States.

Furthermore, appellants do not find a single decision of a lower court, federal or state, in which a congressional redistricting act with population variations as low as those found in the Missouri Act have been invalidated pursuant to Article I, Section 2, United States Constitution. In fact, appellants find no decision in which congressional districts which have a population inequality double of that existing in the Missouri districts have been invalidated. An examination of the many decisions of the lower court in regard to congressional redistricting which have been decided subsequent to **Wesberry v. Sanders**, supra, reflects that the

State of New Jersey in **Jones v. Falcey**, 222 A.2d 101 (N.J. 1966) invalidated a congressional redistricting plan with a population inequality between the largest and smallest district of 57,978. This population inequality between congressional districts which is more than double the population disparity found in the Missouri districts appears to be the lowest population inequality judicially invalidated by any federal or state court.

It should also be noted that numerous congressional redistricting plans have been approved by lower courts (some such plans have in fact been drawn by the lower courts) with population inequalities among the districts approximately double the population inequality among the Missouri districts. See:

Klahr v. Goddard, 250 F.Supp. 537, (D. Ariz. 1966);

Silver v. Reagan, 434 P.2d 621, (Cal. 1967);

Kirby v. Illinois State Electoral Board, 251 F.Supp. 908, (Northern Dist. Ill. 1965);

Levitt v. Maynard, 216 A.2d 778, (N.H. 1966);

Wells v. Rockefeller, — F.Supp. —, (N.Y. March 20, 1968).

Subsequent to **Wesberry v. Sanders**, supra, the population requirements of Article I, Section 2, Constitution of the United States, in congressional districts has resulted in much litigation in the federal and state courts. Appellants have attempted to collect citations to all of such cases which are tabulated below with relevant information.

State	Case	High Pop. In Plan Under Review	Low Pop. In Plan Under Review	Disparity	Comments
Ala.	Moore v. Moore, 229 F.Supp. 435 (SD Ala. 1964)	634,864	236,216	398,648	Plan voided

State	Case	High Pop. In Plan Under Review	Low Pop. In Plan Under Review	Disparity	Comments
	Moore v. Moore, 246 F.Supp. 578 (SD Ala. 1965)	438,130	383,625	44,505	Plan approved
Ariz.	Klahr v. Goddard, 250 F.Supp. 537 (D Ariz. 1966)	663,510	198,236	465,274	Plan voided
		461,495	400,251	61,644	Court plan
		456,529	405,217	51,312	Subsequent legislative plan
Ark.	Park v. Faubus, 238 F.Supp. 62 (ED Ark. 1965)	575,385	332,844	242,541	Plan voided
		453,567	443,892	9,675	Present plan
Calif.	Silver v. Reagen, 432 P.2d 26 (Cal. 1967)	588,933	301,872	207,061	Plan voided
	Silver v. Reagen, 434 P.2d 621 (Cal. 1967)	446,974	392,756	54,218	Plan approved
Florida	Gong v. Bryant, 230 F.Supp. 917 (SD Fla. 1964)	660,335	237,235	423,100	Plan approved for 1964 election void thereafter
	Gong v. Kirk, 278 F.Supp. 133 (SD Fla. 1967)	465,160	374,665	90,495	Plan approved for 1966 election void thereafter
	Aff'd—U.S.—, 19 L.E.2d 784, 88 S.Ct.—	415,704	407,677	8,027	Court plan using estimated pop.
		448,885	400,061	48,824	Bureau of Census determination of pop. in court's plan
Georgia	Wesberry v. Vandiver, 206 F.Supp. 276 (ND Ga. 1962)	823,680	272,154	551,526	Plan approved
	Wesberry v. Sanders, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed 2. 481 (1964)	823,680	272,154	551,526	Reversed and remanded
		455,575	329,738	125,837	Present plan

State	Case	High Pop. In Plan Under Review	Low Pop. In Plan Under Review	Disparity	Comments
Ill.	Kirby v. Ill. State Electoral Bd. 251 F.Supp. 908 (ND Ill. 1965)	552,582	278,703	274,881	Plan voided
	People ex rel. Scott v. Kerner, 211 N.E.2d 736 (Ill. 1965)	451,527	394,481	57,046	Federal & State Court Plan
Indiana	Grills v. Branigin, 255 F.Supp. 155 (SD Ind. 1966)	454,208	369,663	84,545	Plan approved
	Duddleston v. Grills, 385 U.S. 455, 870 S.Ct. 611, 77 L.Ed 578 (1967)	454,208	369,663	84,545	Reversed and remanded
	Grills v. Branigin —Fed. Supp.— (SD Ind. Feb. 14, 1968) Appeal Pending	428,197	417,158	11,039	Court plan
Kansas	Meeks v. Anderson, 299 F.Supp. 271 (D Kan. 1964)	539,592	373,583	166,009	Plan voided
	Meeks v. Avery, 251 F.Supp. 245 (D Kan. 1966)	459,063	394,056	65,007 (Fed. census)	Plan approved
		442,677	427,617	15,060 (state census)	
Kentucky	Clark v. Carter, 218 F.Supp. 448 (ED Ky. 1963)	610,947	350,839	260,108	Plan approved
		457,688	417,544	40,144	Present plan
Md.	Md. Citizen Com. for Fair Cong. Redist. v. Tawes, 228 F.Supp. 957 (D Md. 1964)	443,331	329,826	113,505	Plan approved only for 1964 elections
	Md. Citizen Com. for Fair Cong. Redist. v. Tawes, 253 F.Supp. 731 (D Md. 1966) Aff'd. 384 U.S. 315	393,210	383,237	9,973	Court plan

State	Case	High Pop. In Plan Under Review	Low Pop. In Plan Under Review	Disparity	Comments
Mass.	Dinis v. Volpe, 264 F.Supp. 425 (D Mass. 1967)	478,962	376,336	102,626	Plan voided
	Dinis v. Volpe, —F.Supp— (D Mass. 1967) Aff'd. —U.S.—, 88 S.Ct. 692, 19 L.Ed.2d, 785	433,240	424,524	8,716	Plan approved
Michigan	Calkins v. Hare, 228 F.Supp. 824 (ED Mich. 1964)	494,086 417,026	304,984 403,263	188,102 13,763	Plan voided Present plan
Miss.	Connor v. Johnson, 279 F.Supp. 619 (SD Miss. 1966) Aff'd. 386 U.S. 843	608,041	295,072	313,969	Plan repealed by legislature after reapportionment suit filed.
		449,565	423,300	26,265	Plan approved
Mo.	Preisler v. Sec. of State of Mo., 238 F.Supp. 187 (WD Mo. 1965)	506,854	378,499	128,355	Plan voided
	Preisler v. Sec. of State of Mo., 257 F.Supp. 953 (WD Mo. 1966) Aff'd. 385 U.S. 450	474,895	390,240	84,655	Plan approved for 1966 election, void thereafter.
	Preisler v. Sec. of State of Mo., 279 F.Supp. 952 (WD Mo. 1967) Prob. Juris. Noted—U.S.—	445,523	419,721	25,802	Plan voided
Mont.	Roberts v. Babcock, 246 F.Supp. 396 (D Mont. 1965)	400,573	274,194	126,379	Plan voided
		347,701	327,019	20,682	Court plan
Neb.	Exon v. Tiemann, 279 F.Supp. 603 (D Neb. 1967)	531,098	404,695	126,403	Plan voided
	Exon v. Tiemann, 279 F.Supp. 609 (D Neb. 1968)	507,330	414,887	92,443 (Fed. census)	Plan approved
		512,446	494,768	17,678	(State University estimate)

State	Case	High Pop. In Plan Under Review	Low Pop. In Plan Under Review	Disparity	Comments
N. Hamp.	Levitt v. Maynard, 202 A.2d 478 (NH 1964)	331,818	275,103	56,715	Plan approved
	Levitt v. Maynard, 216 A.2d 778 (NH 1966)	331,818	295,103	56,715	Plan approved
N. Jersey	Jones v. Falcey, 222 A.2d 101 (NJ 1966)	439,756	374,996	57,978	Plan voided
		?	?	?	Present plan
New York	Wells v. Rockefeller, 273 F.Supp. 984 (SD NY 1967) Aff'd. 389 U.S. 421	471,001	350,635	120,366	Plan voided
	Wells v. Rockefeller— F.Supp.— (March 20, 1968)	435,880	382,277	53,673	Plan approved
N.C.	Drum v. Seawell, 249 F.Supp. 877 (MD NC 1965) Aff'd. 383 U.S. 831	491,461	277,861	213,600	Plan voided
	Drum v. Seawell, 250 F.Supp. 922 (MD NC 1966)	?(+8.39%)	(−8.91%)	71,640	Plan approved for 1966 election only. Void thereafter.
	Drum v. Seawell, 271 F.Supp. 193 (MD NC 1967)	423,750	406,474	17,276	Plan approved
Ohio.	Lucas v. Rhodes, —F.Supp.—(ND Ohio 1967)	457,774	319,968	137,806	Plan approved
	Lucas v. Rhodes, 389 U.S. 212, 19 L.Ed.2d 423, 88 S.Ct. 416	457,774	319,968	137,806	Reversed and remanded
	Lucas v. Rhodes, —F.Supp.—(ND Ohio, 1968)	409,939	400,058	9,881	Plan approved
Tenn.	Baker v. Clement, 247 F.Supp. 886 (MD Tenn. 1965)	453,298	341,468	111,830	Plan approved 1966 election. Void thereafter.

State	Case	High Pop. In Plan Under Review	Low Pop. In Plan Under Review	Disparity	Comments
	Baker v. Ellington, 273 F.Supp. 174 (MD Tenn. 1967)	404,968	388,204	16,728	Court plan
Texas	Bush v. Martin, 224 F.Supp. 499 (SD Tex. 1963) Aff'd. 376 U.S. 222	687,151	216,371	470,780	Plan approved for 1964 election. Void thereafter.
	Bush v. Martin, 251 F.Supp. 484 (SD Tex. 1966)	457,092	376,200	80,892	Plan approved for 1964 election. Void thereafter.
		450,353	387,794	62,559	Present plan
Virginia	Wilkins v. Davis, 139 S.E.2d 849 (Va. 1965)	527,098	312,890	214,208	Plan voided
		419,642	377,511	42,131	Present plan
Wash.	Thigpen v. Meyers, 211 F.Supp. 826 (WD Wash, 1962) Aff'd. on other Ginds 378 U.S. 554, 12 L.Ed.2d 1024, 84 S.Ct. 1905	510,512	342,540	167,972	Plan approved
		444,857	353,158	91,699	Present plan

It has been appellants' purpose in this discussion to demonstrate that the population inequalities in the 1967 Missouri congressional districts established by the 1967 Missouri Congressional Redistricting Act are constitutionally permissible. It has been appellants' purpose to demonstrate the constitutional validity of the Missouri Act by citation to cases before this court as well as many cases before lower courts. Appellants recognize that what is constitutionally permissible in congressional districts in one state is not conclusive upon the constitutional validity of a congressional plan in another state. However, where a pattern has been established by learned members of lower courts throughout the country and where a pattern is developing among the cases which have been summarily affirmed by this court, comparisons become persuasive.

Absolute voter equality has been recognized as a standard impossible of achievement. The extent to which voter inequalities are constitutionally impermissible depends to a large extent upon the intangible and indefinable standard of common sense and good judgment. It should be readily admissible that minor variations in the population of congressional districts do not result in unconstitutional voter inequality. It has been appellants' purpose to demonstrate that the population inequalities in the Missouri congressional districts are minor.

Although it is apellant's contention that the population inequalities among the districts are constitutionally permissible per se, the other considerations recognized by the legislature in enacting these districts into law add justification to these minor population variations. As discussed above, the legislature maintained the integrity of county lines with the exception of political subdivisions in the major metropolitan areas of the state. Compactness and contiguity of the districts was recognized as directed by Article III, Section 45, of the Missouri Constitution. Historical and traditional interests were given some recognition.

In addition to these justifications, the evidence reflected that population factors which were peculiar to the largest district, the 8th, were taken into consideration. This district with a population of 445,523 included a great number of transitory and nonvoting citizens. The district includes Fort Leonard Wood which has a military reservation housing approximately 35,000 nonresident and thus nonvoting soldiers. The district includes the University of Missouri in Boone County with a nonvoting student population of approximately 17,000. The district includes Jefferson City, the state capitol, with many inhabitants who maintain a voting residence in other parts of the state. The district

also includes nonresident student population at Lincoln University and Rolla School of Mines, a branch of the University of Missouri, with approximately 4,000 students. The evidence reflects that this nonvoting population was taken into consideration in establishing the 8th District.

The transitory and nonvoting nature of the population referred to above is demonstrated by the evidence in regard to the election returns from Pulaski County wherein Ft. Leonard Wood is situated. A comparison of Pulaski County with all of its adjacent counties in the matter of total vote in relation to the county population in the most recent presidential election reflects that this county of 46,000 population compares with neighboring counties of approximately 10,000 from a voting standpoint.

TOTAL VOTE TO POPULATION—PRESIDENTIAL ELECTION NOV. 1964

County	1960 Population	Total Votes	Percent of Votes
Phelps	25,396	9,531	37.5
Laclede	18,991	8,365	44.0
Texas	17,758	7,836	44.1
Miller	13,800	6,642	48.1
Camden	9,116	5,129	56.2
Maries	7,282	3,246	44.5
PULASKI	46,567	5,239	11.2

Source—Page 1176, Official Manual of Missouri; 1965-66; Pages 27-13, 14, US Census Population; 1960, Number of Inhabitants, Missouri, Final Report PC (1-27A).

The lower court rejected the consideration of this transitory nonvoting population on the basis of **Davis v. Mann**, 377 U.S. l.c. 691, 12 L.Ed.2d 617, (pages 46-47 Appendices to Jurisdictional Statement, 279 F.Supp. l.c. 94).

The authority relied on by the lower court does not prohibit consideration of transitory nonresident personnel in drawing legislative districts. In fact this court sanctioned the exclusion of transitory nonresident population from legislative reapportionment deliberations in **Burns v. Rich-**

ardson, 384 U.S. 73, 16 L.Ed.2d 376, l.c. 391. Appellants emphasize that the legislature made no attempt to reflect the entire impact of transitory nonresident population in drafting the 8th district. The factor of such transitory nonresident population was simply another consideration recognized in the legislative deliberations (A. 88).

The reasonableness of the population differences in the congressional districts under review must also be viewed in the context of legislative interplay. The legislative leaders all testified that the act in question was in their opinion a reasonable legislative compromise. The lower house of the Missouri Assembly has 163 members of which 107 are members of the Democratic Party and 56 members of the Republican Party. The upper House consists of 34 members with 23 members of the Democratic Party and 11 members of the Republican Party. The individual members of the legislature reflect the interests of their constituents as well as the interests of their political affiliation. On final enactment of the 1967 Congressional Redistricting Act, all of the Republican Members of the lower House voted against enactment (Stipulated Exhibit 11, page 13). However in testimony before the court the leader of that party in the lower House testified that the act represented a reasonable legislative compromise and the population variations in the districts seem minor in the context of legislative interplay. He further testified that if his party had been in control of the legislature, the political complexion of the districts would have been different but in all probability the population variations would have been about the same (A. 96 and 98). Prior to final consideration in the upper House all members of the Republican Party had voted against enactment of the bill (Stipulated Exhibit 11, page 16). However, upon final vote, all but one member of the Republican Party voted for enactment in the House (Stipulated Exhibit 11,

page 17). The leader of that party in the Senate, in testimony before the court, stated that although he did not favor the political complexion of the districts created by the bill, he considered the bill to be a reasonable legislative compromise (A. 93).

It must be remembered that the establishment of congressional districts is a legislative function and that practical political problems are inherent in the enactment of congressional reapportionment legislation. If the power of congressional reapportionment resided in the hands of one man who was subject to a strict judicial accounting for mathematical exactness in the population of the districts, mathematical equality could be reached. As a legislative function the courts must recognize as legitimate a consideration of legislative interplay. Other lower courts have recognized the legislative nature of this problem. In **Wells v. Rockefeller**, 66—Civil—1976 SD NY, March 26, 1968 not reported, the court in considering a legislative act establishing congressional districts commented upon the legislative nature of this function as follows:

> "Since no proof has been submitted that the Legislature acted in contravention of the precepts of the Supreme Court with respect to congressional reapportionment, the objections of plaintiffs and objectants are overruled. The Legislature is now constitutionally constituted. In theory at least, the people of the State are being represented by senators and assemblymen of their choice. No matter how lines are drawn, some candidate of some party will always win, be his margin of victory ever so small. Under such circumstances, losing parties and candidates can always point to probable victories had the lines been drawn differently. **Our constitutional system calls for rendering unto the Legislature the things that are the Legislature's.** Reapportionment is

one of such things. Were each political party, and factions within each party, permitted to by-pass the Legislature by asking the courts to foist upon the electorate districts of their own draftsmanship and choosing, representative government would no longer exist. Self-interest would be substituted for majority rule. The courts cannot become pawns in such a political chess game. Here, for example, the plaintiffs apparently represent the State Committee of the Liberal Party and some of the intervenors appear to be associated with reform or independent groups within the Democratic Party. Courts should not enter the political arena at the behest of any party or group. The legislative body may be composed of the representatives of many parties and factions but primarily, as a result of their election, they are the representatives of the people. The task of reapportionment is for the Legislature. Its task here under all the facts and circumstances cannot be said to have been unconstitutionally performed" (emphasis added).

In **Exon v. Tiemann**, 279 F.Supp. 609, l.c. 612(DC Neb., February 1, 1968) the court commented as follows:

"Representative bodies must always act in the public interest and in redistricting matters must make an honest effort to achieve mathematical precision. However, mathematical precision can seldom, if ever, be achieved. This is true even if county lines are not followed."

In **Meeks v. Avery**, 251 F.Supp 245, l.c. 252 (DC Kan. 1966) the court commented on legislative discretion as follows: l.c. 252,

"[7] We find and hold that the Legislature of Kansas, by the enactment of the challenged statute, made a good faith effort to meet the constitutional standards

as set out in Wesberry v. Sanders, supra; that while mathematical perfection was not achieved, that goal was approached as nearly as the legislators in their good judgment believed to be practicable; that the legislature in enacting Chapter 13 did not exceed the permissible bounds of discretion in deviating from apportionment strictly according to population; that a population variance ratio between the most populous and least populous districts of 1.03521 meets minimal constitutional requirements."

The legislative nature of this problem is recognized in **Drum v. Seawell**, 271 F.Supp. 193, 195, (DS MD NC 1967) as follows:

"The constitutional standard enunciated in Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), is to legislative reapportionment what a hurdle is to a steeple chase: a minimum standard that must be cleared. **How** to clear it, so long as there is not gerrymandering for an invidious purpose, and by what optimum margin, are matters within the competence of the General Assembly. The court correctly decides that the plan of reapportionment adopted by the General Assembly of North Carolina is not in violation of the Constitution of the United States."

The legislative process is discussed in **Bush v. Martin**, 251 F.Supp. 484 (DC SD Tex. 1966) l.c. 509 and l.c. 510 as follows:

"**[18-22]** But this is not helpful to the plaintiffs since the goal is not mathematical precision. What is required is not merely that numerical equality be achieved as nearly as practicable. Rather, it is that in this legislative function, the **Legislature** achieve numerical equality as nearly as is practicable. That means

that until such time as the State Legislature indicates its complete unwillingness or inability to face up to the job, the apportionment, state and congressional, is for the Legislature, not the Courts. If—and the if is neither real nor big—it is a legislative function until default, then a proper regard for the separation of powers and the wide discretion necessarily reposed in each branch, must take into account that the Legislature is to employ its traditional methods and processes. This means that for the Legislature to be effective, it must enact legislation.[75] The enactment of legislation is left to a legislative body which exists under the broad commands of the republican form of government Guaranty Clause of Art. 4, § 4, of the Constitution. See Baker v. Carr, 1962, 369 U.S. 186, 218-219, 82 S.Ct. 691, 711, 7 L.Ed.2d 663, 687. Its duty is, of course, to act under the law. And the product may finally be rejected by a reviewing court. But no court can command that legislators agree, or that a majority of them must agree, or that they must agree within specified limits.

"[23] Of course certain minimum standards may be laid down against which the resulting legislative product will be tested. To this extent legislative freedom or discretion is, of course, confined or constricted. But if it is to be legislative action, and courts are to supplant legislative action only after a demonstrated default, then courts must be careful in specifying standards lest what is legislative in name turns out to be in fact merely a court-contrived plan under a more palatable mantel of legislation.

Inevitably some adjustment, some give-and-take, some compromise must come about. What one House of a

[75] In answer to the question whether he could draw a better bill, Mr. Johnson put his finger on the problem when he answered, "Yes, I imagine so, but I don't vote on them • • •"

bicameral Legislature might pass may be wholly unacceptable to the other, and vice versa. The fact that each (see notes 25 and 27, supra, and Appendix B and C) may have separately passed a bill with almost identical maximum deviations is no assurance at all that there is any common meeting ground between the two —no common meeting ground except a consciousness that some law has to be passed and a suitable adjustment must be found.[76] It is easy to attain near numerical equality. It can be done in an infinite number of ways —starting in the metropolitan areas and working out, starting in one corner and working outward, starting in the middle and working to the perimeter. But every effort requires that lines be drawn and the moment three lines are drawn, it affects adjacent, then more remote, and finally the most remote areas. As the examples of reconstituted districts in note 74, supra, reveals, it is no wonder that these legislator-witnesses spoke of the process as a "game of dominoes."

"[24-26] Thus the fact that districting within a 1%

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[76] In trying to ferret out the sources of disagreement between the House and the Senate precipitating the appointment of the Conference Committee and the reporting out of a bill increasing the total deviation from 12% to 19.4%, Mr. Johnson gave these answers:

"Q. Well, I think you said that my assumption in the previous question removed most of the sources of disagreement among the legislators. Now, my assumption related to what I characterized as political considerations; therefore is it not true that the sources of disagreement among the legislators were basically political considerations?

"A. * * * I think I can say yes to that.

"Q. So the difficulty in achieving the best districting bill lay primarily in factors which related in some way to politics; is that correct?

"A. Yes, sir.

"Q. The difficulty did not lie in a mechanical problem of drawing the districts in such a way as to achieve equality of population and compactness primarily?

"A. Of course, there is some difficulty * * * in the mechanics of drawing a district, but I think the primary considerations among the members were political."

tolerance is attainable by a process other than legislative cannot be the final test as to what is reasonable and practicable for legislative action. Courts, faithful to the concept of separation of powers, must recognize therefore the operative effect of so-called "political" factors so long as they do not represent invidious attacks on, or denials of, identifiable basic freedoms such as race or religion.[77] So long as the result passes muster on substantial numerical equality, these might include here such things as the desire to minimize as much as possible the pairing of incumbent congressmen in the transition from the old (unconstitutional) to the new districting,[78] the retention of counties as whole units, the retention so far as possible of former groupings of counties, and the like."

The problem is succinctly stated in **Connor v. Johnson**, 279 F.Supp. 619, l.c. 624 (SD Miss. 1966) affirmed 386 U.S. 483 as follows:

"The point is, however, that the balance in population among the five districts is as nearly perfect as 174 Legislators could ever be expected to agree upon as a distribution among 82 counties and the vote of every citizen, of whatever race, will now weigh equally in the selection of Representatives in Congress."

All of the above citations are part of a realistic recogni-

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[77] Moore v. Moore, S.D. Ala., 246 F.Supp. 578, Oct. 4, 1965 (per curiam):

"Although constitutional rights and principles cannot be ignored or made subordinate to political expediency, courts recognize the fact that legislative bodies in a democracy do not, and cannot perform and function according to a slide rule, or with mathematical precision and certainty. Democracy does not operate in that fashion. There remains the necessity of giving consideration to all legitimate contentions, interests and other appropriate factors involved in the legislative process."

[78] See paragraph 7 of the TLC recommendations, note 19, supra.

tion of the legislative process. Intelligent and wise judges have recognized, with approval, the nature of the legislative creature. The testimony of Senator Avery, Chairman of the Senate Reapportionment Committee, was to the point in much the same vein as follows (A. 117):

> "I might say it's mighty easy to set before the fireside and divide this state, and either one of us could do it very much better than this is done perhaps, but when you got 163 members of the House and 34 members of the Senate and everybody having equal privilege, right to consider a redistricting, it soon gets away from one man's thought about the state and how it should be districted."

Therefore, when viewed from any and all of its manifestations, it must be concluded that the 1967 Missouri Congressional Redistricting Act meets the population requirements of Article I, Section 2 of the Constitution of the United States.

2.

The opinion, decision and judgment appealed from erroneously construed Article 1, Section 2, Constitution of the United States, and Wesberry v. Sanders, 376 U.S. 1 (1964), by finding that congressional districts are not as equal in population as practicable if any other plan proposed to the legislature or to the court can result in districts with smaller population variations.

The majority opinion of the court in the case on appeal finds that the population requirements of Article I, Section 2, Constitution of the United States, have not been met in a congressional redistricting plan if the population variations between the districts are " * * * greater than those that would have been created by better plans in fact presented to but rejected by a legislature or those created by

similar plans that may be presented to a court in the trial of an apportionment case. * * * " (p. 12, Appendices to Jurisdictional Statement, 279 F.Supp. l.c. 964).

The principle in question is unequivocally adopted by the lower court following its discussion in support of the proposition that the phrase "as nearly equal as is practicable" is a precise constitutional standard. This discussion commences in Appendices to Jurisdictional Statement, Page 47 and is concluded on Page 59. The discussion is climaxed on Page 59 with the following ringing pronouncement:

> "The standard of 'as nearly as practicable' means today what it meant to Daniel Webster and has meant throughout our history. Within the context of congressional districting, if plans before the legislature or in evidence before a court establish that more equal districting was obtainable than that which was adopted, then obviously the plan enacted, on the facts, does not meet the now constitutional command that the districting be equal 'as nearly as is practicable.'" (p. 59, Appendices to Jurisdictional Statement, 279 F.Supp. l.c. 990).

The stringent requirements of such a rule are far in excess of the constitutional requirements as construed by this court in **Wesberry v. Sanders**, supra. Furthermore, the rule is in conflict with the opinions of the United States District Courts in other jurisdictions which have been affirmed by this court.

The rule of **Wesberry v. Sanders** is "* * * that as nearly as is practicable, one man's vote in a congressional election is to be worth as much as another's. * * *" The court held that the lines of congressional districts may not be drawn in such a way as to give some voters a greater voice in choosing a Congressman than others. The court recognized that it may not be possible to draw congressional districts with mathematical precision.

In **Connor v. Johnson**, 279 F.Supp. 619 (S.D. Miss.) a Congressional Redistricting Act in the State of Mississippi, which created districts with population variations slightly in excess of the population variations in the 1967 Missouri Act, was upheld by the District Court. Upon appeal to this court it was contended, among other things, that this congressional redistricting plan did not conform to constitutional standards of population equality when compared to available alternatives. It was pointed out that a plan had been proposed to the Legislature and to the court in which the population variations were cut in half as compared to the plan adopted without dividing county lines. The lower court was affirmed by this court without opinion, 386 U.S. 483.

In **Dinis v. Volpe**, Civil Action No. 66-767-G (not reported), District of Massachusetts, October 3, 1967, the court found that a Congressional Redistricting Act in the State of Massachusetts complied with the requirements of Article I, Section 2, of the Constitution. The court noted that a minority report presented a plan to the legislature which would have reduced the population variations in the districts by almost one-half. Upon appeal to this court the decision of the lower court was affirmed on January 15, 1968, Docket No. 882.

Other district courts, in opinions not passed upon by this court, have also rejected the proposition that any better plans will necessarily invalidate the work of the legislature.

In **Wells v. Rockefeller**, — F.Supp. — (S.D. N.Y., March 20, 1968), the court approved a congressional districting plan with a disparity between the most populated and least populated districts of 53,673 and in doing so observed the following:

> "Applying the formulae of permutations and combinations, a myriad of theoretical districts could be evolved.

Thus, plaintiffs urge their plan as somewhat more equal in population. Undoubtedly, others could improve on plaintiffs' plan. But under the law, the task of fixing congressional districts must be borne by the Legislature. The task of the court is to determine whether the plan offends constitutional standards. The asserted grievances of these objectants relate primarily to the manner in which the lines have been drawn in the counties and communities in which they live and where they have their political aspirations and participation. These, they imply, have been seriously interfered with by the realignment. They argue that unnatural divisions of neighborhoods result. However, wherever there is a line, there will be those who live on one side and those who live on the other. Were the lines to be drawn differently, this situation would still obtain. There would be those aggrieved by any change."

In **Exon v. Tiemann**, 279 F.Supp. 609, 612 (D. Neb. 1968), the court noted and summarized the plaintiff's contention as follows:

"Plaintiff in approaching the problem argues that the word 'practicable' should be interpreted to mean 'possible' when applied to redistricting plans. He argues that the plan which the Legislature considered most practicable would have to be the most precise plan mathematically possible and that a plan such as L.B. 1, which is not the most precise plan mathematically possible, should be held unconstitutional unless the defendants justified the deviation."

Although never specifically addressing itself to this contention, the court in sustaining the plan under review necessarily rejected it.

The Texas District Court similarly rejected the idea that better possible plans could overturn the legislative plan.

"But again we hold in fact and law that this mechanical capacity for near numerical perfection does not carry the day." Bush v. Martin, 251 F.Supp. 484, 509 (S.D. Tex. 1966).

District courts that have themselves established congressional districts with substantial (and hence literally "avoidable") population disparities between the most and least populated districts also refute the idea that better possible plans will undermine a plan under review, e.g.:

Klahr v. Goddard, 250 F.Supp. 537 (D. Ariz. 1966) (61,644);

Gong v. Kirk, 278 F.Supp. 133 (S.D. Fla. 1967) aff'd — U.S. —, 19 L.Ed.2d 784 (48,824);

Kirby v. Illinois State Electoral Board, 251 F.Supp. 908, (N.D. Ill. 1965) (57,046).

The United States District Court for the Southern District of Indiana only recently established congressional districts for that state resulting in a disparity between highest and lowest populated districts of 11,039, and this, in the face of an earnest dissenting opinion pointing out the possibility of achieving a disparity of only 235 (which to the dissenting judge was entirely feasible notwithstanding the rather complete fragmentation of Indiana's counties in the process) (**Grills v. Branigin,**—F.Supp.—, (S.D. Ind. Feb. 14, 1968)).

This court has never held that a congressional redistricting act is invalid if other plans which more closely approximate population equality have been presented to the legislature or to the court. The cited cases approved legislative acts under circumstances wherein other plans more closely approximating population equality had been presented to the legislature and the reviewing courts. These decisions have been affirmed by this court. Therefore, it appears that

the opinion of the court on appeal is in conflict with prior decisions of other District Court as affirmed by this court.

The practical complexities involved in the rule adopted by the lower court can lead to endless mischief. The legislative process of congressional redistricting requires the skillful compromise of a multitude of conflicting individual interests. When a legislature has reached the end of the rope in an apportionment tug-of-war and compromise approximating population equality is being finalized, the entire legislative deliberation can be thrown askew if a plan that is slightly better in the terms of population equality is presented as an eleventh-hour proposal. If a legislature adopted the best congressional redistricting plan in terms of population equality among the districts that had been proposed to it, the governor would be under obligation to veto the plan if a better plan in terms of population equality among the districts was proposed to him before such legislation became law by his signature. Even if no better plan in terms of population equality is suggested to the legislature, an adopted plan is subject to being voided in a subsequent court proceeding in which a slightly better plan may be proposed. Appellants find nothing in the prior decisions of this court or in the prior decisions of any other lower court which suggest that the validity of a congressional redistricting plan may be void if any mathematical improvement in the population of the districts can be demonstrated.

3.

The opinion, decision and judgment appealed from erroneously construed Article I, Section 2, Constitution of the United States, and prior decisions of this court by holding that population variations between congressional districts which are de minimis are constitutionally impermissible; and by holding that minor variations in the population of the congressional districts are constitutionally impermis-

sible in the absence of competent and substantial evidence justifying the variations.

The majority opinion of the court in the case on appeal rejects the principle that population variations between congressional districts which are de minimis are constitutionally permissible and the court further finds that minor variations in the population of congressional districts are constitutionally impermissible in the absence of competent and substantial evidence justifying the variations. These stringent principles adopted by the court are in excess of any prior lower court decision or any prior decision by this court. The excessiveness of these principles adopted by the lower court is in conflict, either expressly or impliedly, with **Wesberry v. Sanders**, supra; **Reynolds v. Sims**, 377 U.S. 533 (1964); **Swann v. Adams**, 385 U.S. 440 (1967); **Kilgarlin v. Hill**, 386 U.S. 120 (1967); **Preisler v. Secretary of State of Missouri**, 257 F.Supp. 953, (W.D.Mo. 1966) aff'd. sub nom. **Kirkpatrick v. Preisler**, 385 U.S. 450 (1967); **Connor v. Johnson**, supra; **Dinis v. Volpe**, supra; and a multitude of District Court decisions from jurisdictions all over the United States constituting most if not all of the congressional redistricting cases decided since the decision in this court's landmark case, **Wesberry v. Sanders**.

Wesberry v. Sanders recognizes that it may not be possible to draw congressional districts with mathematical precision. **Reynolds v. Sims** teaches that mathematical nicety is not a constitutional requisite and that mathematical exactness or precision is hardly a workable constitutional requirement. **Swann v. Adams** declares, 385 U.S. l.c. 444:

> "• • • De minimis deviations are unavoidable, but variations of 30% among senate districts and 40% among house districts can hardly be deemed de minimis and none of our cases suggests that differences of this

magnitude will be approved with a satisfactory explanation grounded on acceptable state policy. * * * "

Preisler v. Secretary of State (authorized by the same judicial writer who prepared the opinion in the case at Bar) recognizes that the doctrine of de minimis is applicable to population variations between congressional districts as follows (257 F.Supp. l.c. 973):

> "* * * Use of such words as 'feasible' and 'practicable' in a careful statement of the fundamental constitutional principle constitutes but a recognition that the familiar doctrine of **de minimis** is applicable and is designed to make clear that a State legislature would not be expected to create entirely new political subdivision lines in order to have absolute and precise mathematical equality in its congressional districts."

Kilgarlin v. Hill rejects the constitutional validity of population variances of the size and significance before the court in that case (14.84% in excess and 11.64% below a mathematically ideal district). **Dinis v. Volpe** finds that the deviations from mathematical perfection in the Massachusetts Congressional Redistricting Act are obviously de minimis. **Connor v. Johnson,** gives implicit recognition to the doctrine of de minimis by finding that the population variations of congressional districts in the Act reviewed by the court (variations in excess of those found in the Missouri Act) reflect districts substantially equal in population. All of the principles cited in this paragraph have been expressly declared by this court or declared by lower court decisions which have been affirmed by this court.

Other decisions from the United States District Courts have recognized and followed the doctrine of de minimis in congressional redistricting cases either expressly or impliedly. One of the most recent expressions of the doctrine is found in **Exon v. Tiemann,** 279 F.Supp. l.c. 612:

"[2] We believe that all that is required under the teachings of the United States Supreme Court cases dealing with congressional redistricting is that the variances be slight and justifiable. If the variances are slight, that in itself may be a justification for any plan that has not been reached by improper motive.

Based upon the 1967 projections, the largest district is .74% above median; the smallest district is .46% below the median. The remaining district is but .28% below the median.

[3] Based on the 1966 Bureau of Business Research figures, the largest district is 1.44% above the median and the smallest district 2.09% below the median. The remaining district is approximately .66% above the median. We regard these variances as slight under the evidence before us. We conclude that the de minimis doctrine applies and that its application is not limited to situations where the most nearly mathematically exact districts have been created and the question is whether the disparity between such districts is de minimis. We conclude that if the disparity is de minimis that the courts, applying the 'rule of reason' should approve an enactment such as L.B. 1 where the Legislature has properly maintained the integrity of political subdivisions and has recognized natural or historical boundary lines or similar considerations in giving final approval to its enactment, and has not been influenced by improper motive."

The fundamental principle of the system of representative government in this country requires that the goal in establishing congressional districts is to provide a near equal voice to each individual in the election of representatives. This ultimate goal cannot be reached but the Constitution requires that the end result of efforts in pursuit of the

goal be that one man's vote shall as nearly as is practicable be worth as much as another's. The failure of perfection in pursuit of this goal is evident from the assignment of the number of members of Congress to the several states. Under this complicated process the State of New Hampshire with two members of Congress assigned could elect Congressmen from mathematically ideal districts composed of 303,461 people. At the other end of the pole the State of Maine with two Congresmen assigned could elect members of Congress from mathematically ideal districts composed of 484,633 people. Mathematically ideal districts in the remainder of the states which elect more than one Congressman run the scale between these two extremes. (In passing, it is interesting to note that congressional districts in the State of Maine vary in population by 8.60% and congressional districts in the State of New Hamprhire vary by 18.68%). Thus, the fundamental goal of one-man one-vote is impossible of achievement in electing members of Congress throughout the 50 states.

Appellants do not intend to suggest that the variations in hypothetically ideal districts among the several states from 303,461 to 484,633 should permit individual states to establish congressional ditricts with substantial and significant population variations. Appellants support wholeheartedly the one-man one-vote principle and its application to congressional redistricting plans as a necessary and desirable foundation block in our cherished system of representative government. However, appellants insist that common sense dictates, and the concept of practicable anticipates, a zone or reasonableness in the variation of populations among congressional districts which may be said to meet the requirements of Article I, Section 2, of the Constitution, without further explanation. Population variations within this zone of reasonableness are de minimis.

Appellants are supported in rationale of the previous two paragraphs by the court's commentary in **Exon v. Tiemann**, 279 F.Supp. l.c. 612, as follows:

> "In apportioning the 435 Representatives in the Congress to the States, the basis was one Representative for each 410,481 of population. Nebraska, with a population of 1,411,330, was apportioned three Representatives. The Nation's population in 1960 was 179,323,175. Thus, in Nebraska, there are 179,887 people, or 12.7% of its population who, it could be argued, are not fully represented in the Congress, though they receive the representation the Constitution provides. "Mention is made of these variations, not that we would justify variations in Congressional Districts of 12.7% but because we believe that in determining what is **de minimis**, and in applying that doctrine and measuring it against the principle of one person, one vote, we must recognize that the states do not and can not have exact mathematical representation in the Congress. For a court to demand of a legislative body fixing Congressional District boundaries under such circumstances, complete mechanical exactness is unrealistic."

(By the same reasoning, there are 215,003 people in Missouri that are unrepresented.)

Appellants presented to the lower court a table of the several states reflecting current congressional districts in the order that the largest and smallest district in such states vary in per cent of population from the smallest deviation to the largest deviation. Appellants have continued to bring this table up-to-date as changes occur concerning congressional districts throughout the country and there follows such a table with data as current as appellants have been able to make at this writing.

State & Cong. Dists.	Ideal Size	Largest	Deviation From Avg. Largest	Smallest	Deviation From Avg. Smallest	Total % of Deviation
Ark(4)*	446,568	453,567	+ 1.57	443,892	— .60%	2.17
Ohio(24)*	404,433	409,939	+ 1.36	400,058	— 1.08%	2.44
Mass(12)**	429,048	433,240	+ .97	424,524	— 1.05%	2.02
Md(8)**	387,586	393,210	+ 1.45	383,237	— 1.12%	2.57
Ind(11)**	423,863	428,197	+ 1.02%	417,158	— 1.58%	2.60
Utah(2)**	445,319	451,864	+ 1.47%	438,763	— 1.47%	2.94
Mich(19)*	411,747	417,026	+ 1.28%	403,263	— 2.06%	3.34
Okla(6)*	388,047	396,161	+ 2.09%	380,734	— 1.88%	3.97
N.C.(11)**	414,196	423,750	+ 2.31%	406,474	— 1.86%	4.17
Tenn(9)**	396,343	404,968	+ 2.176%	388,240	— 2.044%	4.22
Mo(10)	431,961	445,523	+ 3.13%	419,721	— 2.83%	5.96
Miss(5)**	435,628	449,565	+ 3.19%	423,300	— 2.83%	6.02
Mont(2)**	337,384	347,701	+ 3.08%	327,066	— 3.08%	6.16
Wisc(10)*	395,178	408,677	+ 3.42%	382,818	— 3.20%	6.62
S.D.(2)***	340,257	351,901	+ 3.42%	328,613	— 3.42%	6.84
Me(2)***	484,633	505,435	+ 4.30%	463,800	— 4.30%	8.60
Ky(7)*	434,022	457,688	+ 5.45%	417,544	— 3.80%	9.25
N.D.(2)	316,223	333,290	+ 5.40%	299,156	— 5.40%	10.80
Va(10)*	396,695	419,642	+ 5.78%	377,511	— 5.08%	10.86
S.C.(6)*	397,099	421,478	+ 6.14%	375,576	— 5.42%	11.56
Ariz(3)*	434,054	456,529	+ 5.18%	405,217	— 6.64%	11.82
Fla(12)**	412,630	448,885	+ 8.78%	400,061	— 3.05%	11.83
#		(415,704)	(+ .74%)	(407,677)	(— 1.20%)	(1.94)
N.Y.(41)*	409,324	435,880	+ 6.48%	382,277	— 6.60%	13.08
Calif(38)*	413,611	446,974	+ 8.1 %	392,756	— 5.0 %	13.1
Ala(8)**	408,343	438,130	+ 7.3 %	383,625	— 6.10%	13.40
Ill(24)**	420.048	451,527	+ 7.45%	394,481	— 6.1 %	13.6
R.I.(2)***	429,744	459,706	+ 6.97%	399,782	— 6.97%	13.94
Ore(4)***	442,172	468,809	+ 6.02%	404,165	— 8.60%	14.62
Kans(5)**	435,722	459,063	+ 5.36%	394,056	— 9.56%	14.92
#	(436,107)	(442,677)	(+ 1.51%)	(427,617)	(— 1.95%)	(3.46)
Tex(23)*	416,506	450,353	+ 8.1 %	387,794	— 7.1 %	15.2
N.J.(15)**	404,452	439,756	+ 8.73%	374,996	— 7.28%	16.01
Conn(6)*	422,539	482,135	+14.10%	404,201	— 4.34%	18.44
N.H.(2)**	303,561	331,818	+ 9.34%	275,103	— 9.34%	18.68
Idaho(2)	333,596	364,984	+ 9.41%	302,207	— 9.41%	18.82
Neb(3)*	470,443	507,330	+ 7.84	414,807	—11.8 %	19.64
#	(512,446)	(512,446)	+ 6.48	(382,277)	— 2.09%	(3.53)
Colo(4)*	438,488	493,887	+12.63	405,899	— 7.43%	20.06

State & Cong. Dists.	Ideal Size	Largest	Deviation From Avg. Largest	Smallest	Deviation From Avg. Smallest	Total % of Deviation
La(8)	407,128	462,753	+12.03	370,131	— 9.09%	21.12
Wash(7)***	407,602	444,857	+ 8.38	353,158	—13.36%	21.74
Iowa(7)*	393,934	442,406	+12.30%	353,156	—10.35%	22.65
Minn(8)*	426,733	482,872	+13.16%	375,475	—12.01%	25.17
Pa(27)*	419,236	482,201	+15.02%	356,821	—14.89%	29.91
Ga(10)*	394,312	455,575	+15.54%	329,738	—16.38%	31.92
W.Va(5)*	372,064	422,046	+13.43%	303,098	—18.54%	31.97

Parenthesized data based on other than 1960 Federal Census
* Data verified by office of State's Attorney General, October, 1967
** Data verified by court opinion
*** Data obtained from
Congressional Quarterly Weekly Report, Sept. 16, 1966
National Municipal League. Apportionment in the 1960's August 1967
U.S. Senate. Report No. 291. 90th Congress, 1st Session June 1, 1967

This table reflects the changes which have been made in the several states is applying the one-man one-vote principle to congressional districts pursuant to **Wesberry v. Sanders,** supra. Appellants contend that the table reflects the results of the application of the doctrine of deminimis to population variations is congressional districts. Appellants recognize that population variations among congressional districts in one state which have been found to meet the requirements of the Constitution do not necessarily support constitutional validity of similar population variations in another state. However, the court recognized the validity of such comparisons in **Dirds v. Volpe**, 264 F.Supp. l.c. 429, as follows:

> "[4] While staying within mathematical limits judicially approved in comparable congressional districting cases is not necessarily to stay within constitutional bounds for the reason, as we have already pointed out, that apportionment cases are not to be decided by application of any mathematical formula but must be solved by the test of practicability with reference to

the specific situation present in the state involved, nevertheless deviations from the ideal quotient judicially disapproved in other cases do give some indication of the limits of constitutional departure from numerical equality. * * *'' See also **Exon v. Tiemann**, supra.

The court unfairly and unjustifiably rejected appellants' table comparing Missouri with other states in the matter of current congressional district statistics. The court apparently discarded this table because the court believed that the expression of the total percentage deviation from the ideal should be expressed in some other manner than in the mere addition to the highest and lowest percentage figures. The court chose to disregard the only purpose of this particular mathematical device, that being only a means of conveniently arranging the various states in a logical sequence. For its intended purpose the method was not inaccurate, and for the court to conclude from this single factor that the entire able was inaccurate, and thus unworthy of any consideration, was improper.

This exact identical mathematical expression has been used by the following eminent authorities: **Moore v. Moore**, 246 F.Supp. 578, l.c. 580 (SD Alabama 1964), **Bush v. Martin**, 251 F.Supp. 484, l.c. 489 (SD Tex. 1966), **Grills v. Branigin**, 255 F.Supp. 155, l.c. 157-158 (SD Indiana 1966), **Wells v. Rockefeller**, 273 F.Supp. 984, l.c. 966 (S.D. NY 1967) **Gong v. Kirk**, 278 F.Supp. 133, l.c. 134, 135 (SD Florida 1967).

One of the sources for the table cited by appellants was the Congressional Quarterly Weekly Report of September 16, 1966. The court comments that he has examined the source at page 814 and found that it did not agree with any of the figures on appellant's table. The Congressional Quarterly for September 16, 1966 does not have a page 814. There is a page 814 in the Congressional Quarterly for April 15, 1966 which does tabulate statistics in regard to

congressional districts. Therefore it is obvious that the lower court has condemned appellants of inaccuracy by reason of examining the wrong source, a source not used by appellants (279 F.Supp l.c. 991, pages 10 and 11 Footnotes to Appendices to Jurisdictional Statement). Furthermore the court did not even properly interpret the wrong source which it would examine. The court should have noted that the table examined in the wrong source did not attempt to list the total variation from highest district to lowest district as did appellant's table, but merely listed the "Maximum Variations" in only a single direction from the ideal.

Appellants are baffled at the court's implication that none of the figures on the table agree with sources cited by appellants. The principal source of the table was the publication by the National Municipal League in August 1967, entitled Apportionment in the 1960's. The information was made current by the other sources cited. In spite of the contempt expressed by the court, appellants firmly stand upon the accuracy of the table.

The court also rejects appellant's comparative table as a matter of law based upon **Davis v. Mann**, 377 U.S., l.c. 682. An examination of the authority cited by the court reveals merely a summary of the evidence presented in the lower court to have included "results of a comparative study of legislative reapportionment [showing] Virginia as ranking eighth among the states in population-based legislative representativeness as reapportioned in 1962." l.c. 682. The opinion of this court nowhere addresses itself to the validity of such evidence and therefore the lower court's statement that this court had therein" * * * rejected defendant's attempted justification based on that sort of comparative data." is not sustained by **Davis v. Mann** (Pages 60 and 63 Appendices to Jurisdictional Statements, 279 F.Supp., l.c. 991, 993).

The lower court further relies on **Swann v. Adams** before this court as authority for rejection of appellant's comparative table. The citation from **Swann v. Adams** must be considered in its context and must be quoted in full (which the lower court failed to do). The complete statement by this court is as follows:

> "In any event, the fact that a 10% or 15% variation from the norm is approved in one State has little bearing on the validity of a similar variation in another State. 'What is marginally permissible in one State may be unsatisfactory in another, depending upon the particular circumstances of the case.' Reynolds v. Sims, 377 U.S. 533, 553, 578, 12 L.Ed.2d 506, 522, 536, 84 S.Ct. 1362."

It is obvious that the 10 or 15% variation from the norm which the court was considering in **Swann v. Adams** could not form the basis for a comparison of variations in the area of de minimis. It is further obvious that **Swann v. Adams** and **Reynolds v. Sims** were referring to substantial population variations which might be marginally permissible on the basis of other justifications. Appellants on the other hand are demonstrating to the court that certain population variations are de minimis or minor and constitutionally permissible per se. A comparison of how Missouri stands in relation to the several states in view of the multitude of congressional redistricting plans which have been adopted subsequent to **Wesberry v. Sanders** is relevant to the question of de minimis.

4.

The opinion, decision and judgment appealed from is erroneous and in conflict with prior decisions of this court in holding that in establishing congressional districts no allowance can be made for legislative interplay and that any population deviations from absolute mathematical

equality between congressional districts attributable to political compromise within the state legislature is arbitrary and discriminatory and invalidates such legislation. The opinion renders nugatory considerations other than population which may be recognized by the legislature in drawing congressional districts as provided by prior decisions of this court.

The legitimacy of legislative interplay in the enactment of any legislation including congressional redistricting has been discussed at length under the first argument of this brief. In that discussion cases from the United States District Courts in New York, Nebraska, Kansas, North Carolina, Texas and Mississippi were cited in which recognition and approval of the complicated and tedious legislative process was expressed.

Connor v. Johnson, supra, which is one of the cases referred to above, was affirmed by this court. Although this court has not expressly alluded to legislative interplay as one of the considerations to be taken into account in judging the constitutional validity of congressional redistricting, it is clear from the opinions of this court that judgment must be exercised in contemplation of all legitimate considerations.

In **Reynolds v. Sims**, supra, and **Swann v. Adams**, supra, this court established, as a guideline to be applied in redistricting cases, the principle that minor population variations which are based upon legitimate considerations incident to the effectuation of a rational policy are permissible. Among the legislative considerations enumerated by this court are the integrity of political subdivisions, the maintainance of compactness and contiguity in legislative districts and the recognition of natural or historical boundary lines. Furthermore in **Reynolds v. Sims**, supra, the court commented with approval on the legislative nature of con-

gressional redistricting. Therefore, it appears to appellants that this court has given implied recognition and approval to legislative interplay as a legitimate consideration in legislative redistricting matters.

5.

The opinion, decision and judgment appealed from is based upon conclusions which result from a multitude of inaccuracies, irrelevancies and distortions in the findings of fact. For example: the court erroneosuly found that the Missouri Legislature at no time considered accurate 1960 census figures; the court erroneously found that "better plans were in fact presented to but rejected by Missouri legislators"; the court distorted the testimony of legislative leaders; the court relied upon post-hearing information from unknown sources to discredit appellant's evidence in regard to areas of the state with growing population; the court erroneously assumes that rural voters and urban voters must be segregated in congressional districting; and many more.

The opinion, decision and judgment appealed from is so fraught with distortions, inaccuracies and irrelevancies that its decision should not stand. These inaccuracies arise continually throughout the opinion and throughout the Findings of Fact. Some of the conclusions are necessarily erroneous being based upon factual inaccuracies. It is difficult to classify or pinpoint these inaccuracies into groups for the purpose of overcoming erroneous conclusions. However, a discussion of these inaccuracies follows for the purpose of demonstrating the seriousness of such erroneous fact finding.

1. The lower court found that the General Assembly at no time ever considered accurate 1960 census population figures in its consideration of the 1967 Act (p. 4, Appendices to Jurisdictional Statement, 279 F.Supp. l.c. 957). The State-

ment of Facts to this brief sets out clearly that the General Assembly considered accurate 1960 census population figures throughout its deliberations in regard to the 1967 Act and that inaccuracies in calculations arose during the last few days prior to final enactment. No further discussion of the court's inaccurate finding in this regard appears necessary.

2. The majority opinion of the lower court finds that "better plans were in fact presented to but rejected by (the 1967) Missouri legislators." This finding by the court is one of the principle foundation blocks upon which it bases its conclusion that the congressional districts in the enacted plan are not as nearly equal in population as practicable. This conclusion by the court is based upon fallacious findings of fact.

The court comments at length upon House Bill No. 870 as being a better plan than the enacted plan. In the words of the court this plan "* * * provided districts that vary substantially less from the ideal than any bill ever before proposed by any Missouri legislature. * * *" In reaching its conclusion the court calculated the population of the various districts proposed by House Bill No. 870. In doing so the court lumped the entire population of the area encompassed by proposed Districts 1, 2, 3, and 9 into one population total. This population total was divided by 4 and equal populations of 431,896 were assigned to these 4 districts. **These district populations bear no relationship what so ever to the populations actually present within these individual 4 districts.** A conclusion that House Bill No. 870 was a better plan from the one-man one-vote concept based upon such a factual premises is entirely fallacious.

Appellants have not calculated the populations of the 4 districts in question. Furthermore, it does not appear that the sponsors of the bill made any attempt to calculate the

populations of these districts. The proposed bill utilized 1960 ward and precinct boundaries in the City of St. Louis and 1965 township and precinct boundaries in St. Louis County. Relating 1960 census data to the boundaries described in the proposed bill make it difficult, if not impossible, to compute the population totals of the districts. Any accurate computation of the population of these districts should be made by the experts at the Bureau of Census.

If it is valid to calculate the populations for congressional districts as done by the court for the 4 districts in question, it is equally valid to take the entire geographical area of the State of Missouri with its total population, divide by 10, place 10 abstract stars on a map of the State of Missouri and conclude that 10 perfect congressional districts have been established in so far as population is concerned. **Reductio ad Absurdum!**

In finding that better plans than the enacted plan were available to the legislature the court referred to its opinion in the prior case, **Preisler, et al. v. Secretary of State,** at 257 F.Supp. l.c. 964, in which the court commented upon the Senate Committee Substitute for Senate Bill No. 302[320] which had been proposed to the 1965 legislature. An examination of this proposed Bill reflects that the court inaccurately calculated the population of the 6th district at 442,253, whereas the correct census population of that proposed district, which consisted of entire counties and is thus calculated by simple arithmetic, was 444,252. The low district of that plan was No. 7, with a population of 417,399 as recognized by the court. Thus, the population variation between these two proposed districts was 26,853, which is in excess of the population variations between the largest and smallest districts of the 1967 Act. This inaccurate finding is made by the court at page 14, Appendices to Jurisdictional Statement, 279 F.Supp. l.c. 965.

The court repeatedly engages in redistricting dominoes and by moving one domino the inference is left that an overall congressional redistricting plan would result which was a "better plan" in that population variations between the largest and smallest district would be less than such variations in the enacted bill. On page 21 Appendices to Jurisdictional Statement, 279 F.Sunpp. l.c. 974, the court finds that House Committee Substitute for Senate Committee Substitute for Senate Bill 182 proposed to and rejected by the General Assembly was a better plan. It is true that the court's dominoe game with the plan would have improved the proposed equality in some of the districts. However the overall variance between the largest and smallest district would have been 26,065 or slightly more than the 1967 act. In this discredited plan, which was emphasized by the court, the court found that district 10 would have had a population of 1,064 in excess of an ideal district. In fact the proposed district 10 in this discredited plan would have had a population of 12,409 in excess of an ideal district. This was brought to the specific attention of the judicial author of the opinion of the lower court upon his own interrogation of the Majority Leader of the lower House (A. 69, 70).

On pages 23 through 25, Appendices to Jurisdictional Statement, 279 F.Supp. 971, the court comments upon Senate Bill 182 and leaves the clear implication that this bill was a better plan than the enacted bill. An analysis of this bill reflects that the population variation between the largest and smallest district was 25,721, a variation almost identical with that which resulted with the enacted bill.

3. A disortion of the facts was made by the court on page 25 and 26 of Appendices to Jurisdictional Statement, 279 F.Supp., l.c. 971. The Eighth District is the largest district in the 1967 act with a population of 13,542 in excess of an ideal district. The court proposes to improve the

population inequality of this district by shifting Howard County with a population of 10,989 to the district and eliminating from the district St. Louis County population of 88,659 (A. 6). The result of this judicial "improvement" would be an Eighth District with a population of 366,723 or thus this "improved" rural district would have a population of 65,258 below an ideal average district. As nearly equal as practicable!

The court creates three new districts for the City of St. Louis and St. Louis County at pages 27 and 28, Appendices to Jurisdictional Statement, 279 F.Supp. l.c. 972, 973. The remaining St. Louis County population after the creation of these population districts would be 155,315. The court stops his redistricting game at this point with the bland statement that this population of 155,315 could be taken into an adjoining out state district. The only adjoining out state district is the 9th with a population of 428,223.

Appellants note that two of these townships, Spanish Lake and Florissant, were the areas of St. Louis County that were in fact placed in the northeast Missouri 9th congressional district by the 1967 Missouri Legislature, but the two other court-neglected townships, Ferguson and Airport, with a population of 102,709, could hardly be added to the 9th district, when such district had a population in the enacted bill of 428,223, nor could these two townships be placed in any other "out state" district because they are geographically separated from all other such districts by the court's 3rd "perfect" St. Louis area congressional district (See maps at p. 131 and p. 154 of Appendix).

Obviously the wholesale shuffling of rural counties to accommodate the court's St. Louis plan would constitute an entire congressional redistricting checkers game.

4. The court at pages 37 and 38, Appendices to Juris-

dictional Statement, 279 F.Supp. l.c. 978, finds that the population variation between the largest district, No. 8, and every other district except No. 5, exceeds 16,000 people. This finding is wholly inaccurate. Simple arithmetic discloses that District 8 exceeds the population of the remaining districts as follows:

No. 1— 5,777
No. 2— 9,075
No. 3— 9,424
No. 5—14,345
No. 7— 8,754
No. 4—25,802
No. 6—23,285
No. 9—17,300
No. 10— 2,655

Thus, it is clear that District 8 does not exceed five of the remaining districts by a population of 16,000, and in most instances the population is far less than 16,000.

5. The court recognized the direction of Article III, Section 45, of the Missouri Constitution, that congressional districts should be as compact as may be. Appellants have contended that compactness was one of the significant considerations of the General Assembly in formulating the 1967 Act. The majority opinion proposes the shifting of various counties for the purpose of achieving greater population equality. It can be demonstrated that the shifts proposed will in every instance cause compactness to suffer. There follows a map of the State of Missouri reflecting the congressional districts as composed in the 1967 Act. Counties which the court proposed to shift into other districts have been shaded. Thus, Schuyler County will become a part of District 6 (Appendices to Jurisdictional Statement, pp. 23,

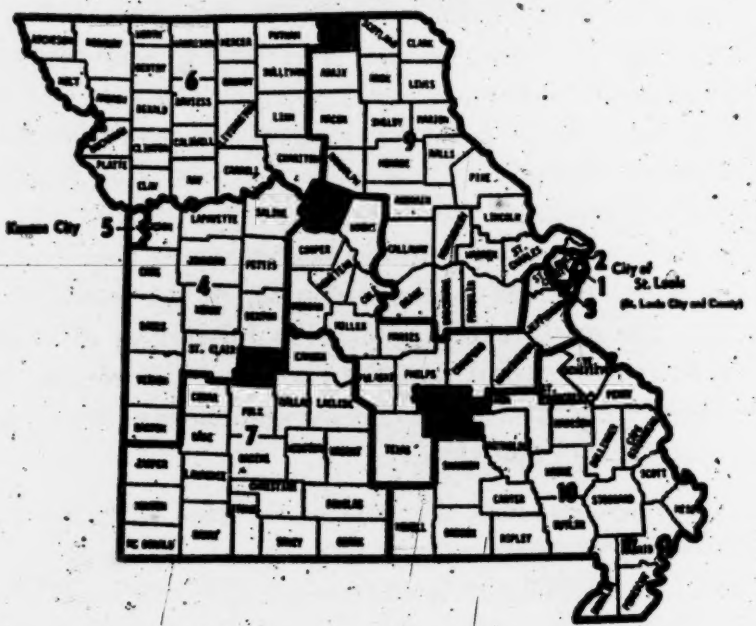
24; 279 F.Supp. l.c. 970). Howard County and Hickory County would become a part of District 4 (Appendices to Jurisdictional Statement, pp. 24, 25, 30; 279 F.Supp. l.c. 971, 974). Dent County would become a part of District 10 (Appendices to Jurisdictional Statement, p. 31, 98; 279 F.Supp. l.c. 974, 1004). It is clear from the map that compactness would suffer by such changes. Perhaps the most startling example of ignoring compactness would be the attachment of Howard County as sort of a stubby handle to District 4. The population improvements resulting from the shifting of such counties would not approach mathematical exactness as reflected by the tabulation of the resulting districts on the map, together with the tabulation of existing districts. It is apparent that the variation between the largest and the smallest district (the 1st and the 9th) would be in excess of 16,000 population.

Other "better plans" demonstrated a lack of judicial consideration to compactness. For example, Map 1, p. 39, Appendices to Jurisdictional Statement, 279 F.Supp. l.c. 979, creates an 8th district with Texas County as a stubby handle. Map 2, p. 40, Appendices to Jurisdictional Statement, 279, F.Supp. l.c. 980, creates a river district of a string of counties following the Mississippi River two-thirds of the length of the State of Missouri.

The Ten
CONGRESSIONAL DISTRICTS
of Missouri

(As Redrawn By The 74th General Assembly - 1967)

MISSOURI STATE CHAMBER OF COMMERCE



DISTRICT POPULATIONS

	Judicially Proposed Districts	Enacted Districts
1st	439,746	439,746
2nd	436,448	436,448
3rd	436,099	436,099
4th	435,096	419,721
5th	431,178	431,178
6th	427,290	422,238
7th	432,613	436,769
8th	424,219	445,523
9th	423,171	428,223
10th	434,311	423,868

6. Distortions of testimony by the majority opinion influenced erroneous conclusions.

In appraising the testimony of legislative leaders the court concluded that the standard followed by the Missouri Legislature was "* * * how much variance can we expect to get away with. * * *" In reaching this conclusion the court alluded to the testimony of Senator Avery, the author of Senate Bill 182. The court quotes his testimony to the effect that the "* * * Missouri legislature could comply with the 'as nearly as is practicable' standard of Wesberry v. Sanders by getting within 2% of the equality demanded by Article I, Section 2." When Senator Avery's testimony is viewed in its context, it becomes apparent that the witness, while recognizing that perfect population equality had not been achieved, considered variances of "a little over 2% under" and "approximately 2% over" for the two particular districts about which the witness was testifying to be not unreasonable in the light of other considerations. The other considerations to which the witness was referring were compactness, as required by the state Constitution, and the integrity of county lines.

The court makes a distortion of another witness's testimony by editing the testimony so as to make it appear that the witness believed the 1967 Missouri General Assembly had rejected "* * * a better bill, a stronger bill * * *" in terms of closer equality in population. This witness, the Minority Leader of the House of Representatives, made the statement referred to in quotes in regard to the political composition of the proposed districts in a Bill which had been rejected by the Legislature. It is quite clear that the witness considered the rejected Bill to be "* * * a better bill; a stronger bill * * *" insofar as his political party was concerned rather than insofar as population equality is concerned.

7. Appellants submitted testimony by legislative leaders to show that the General Assembly in establishing the 4th and 6th districts as districts with a population of less than the ideal average, took into consideration that these districts include areas of rapid population growth since 1960. The court refutes this testimony by going outside the record and reaching population projections allegedly received from the Missouri Division of Health and the University of Missouri's College of Agriculture (pp. 42-44, Appendices to Jurisdictional Statement; 279 F.Supp. l.c. 982-983). The judicial impropriety of the court in gathering ex parte and post-hearing evidence on its own to refute testimony received before the court is so patently obvious as to require no further comment.

Furthermore, appellants to this day are unaware of the sources used by the court. Appellants do not know whether this information came to the court by way of publications, by way of telephone conversations, by way of heads of departments, clerks or janitors in these departments, etc. Appellants, therefore, can place no reliance whatsoever on the accuracy of these projections.

8. In a footnote at this point (p. 9, footnotes to Appendices of Jurisdictional Statement; 279 F.Supp. l.c. 970) the court lambasted the idea that the 1967 Missouri Legislature was justified in taking cognizance of population trends in establishing congressional districts. Particular reference was made to the evidence that in establishing the 6th congressional district the Missouri Legislature considered that this was a rapidly growing district in terms of population since the 1960 census and therefore, this district could be so drawn as to have less apparent population than the ideal average based on the 1960 census. The court proceeded to demonstrate that the legislature's logic was unfounded in fact by subtracting all areas of the 6th district lying within

the corporate limits of Kansas City to reach the conclusion that the 6th district had a net population loss of some 28,424 from 1950 to 1960. Apart from what appellants feel to be the irrelevancies of this footnoted argument by the court, which is the court's idea that rural favoritism and urban discrimination was again at work, the proposition fails because regardless of the composition of the 6th district as established by the 1967 Missouri Legislature, (whether it contained rural areas only or a combination of rural and urban, which it admittedly did) the district as considered by the legislature must be taken as a whole, and not divided; as the court did, into areas of growing population and areas of declining population. Thus, taking and using the court's own figures in the footnote, the 6th congressional district as established by the 1967 Missouri Legislature had a net population increase from 1950 to 1960 of 10,306. The court was in error; the correct figure is 14,571. If the court chooses to discuss an animal, it cannot sever parts of its body and thereafter treat the creature as though no amputation had occurred! Appellants cannot leave unnoticed certain inaccurate figures in this same footnote. The court states there was a net population loss of 40,467 in those counties of the 6th district that declined in population from 1950 to 1960. The actual loss for those counties was 36,202. The court also states that three counties in the district had population gains for the period of 50,773, to which appellants agree, but that only 12,043 of this was in areas outside the corporate limits of Kansas City. The court is thereby stating that 38,730 of the gain was in Kansas City. That part of Kansas City in Clay County admittedly increased 21,371 from 1950 to 1960. (U.S. Census of Population, 1960, Mo., Number of Inhabitants, PC(1) 27 A Mo. p. 27-16). But Platte County, the only other county of the 6th district wherein Kansas City lies, itself increased only 8,377 from 1950 to 1960 (Ibid., p. 27-21). Obviously, substantially more than

12,043 of the decennial gain for the three counties lay outside of Kansas City!

9. The lower court's frequent remonstrance of the Missouri legislature for favoring rural voters at the expense of their city cousins is not, and cannot be based upon a conclusion that rural districts are substantially under-populated and urban districts substantially over-populated by the 1967 Act. Witness the following tables:

ENTIRELY URBANIZED DISTRICTS

(Bureau of Census Standard Metropolitan Statistical Areas, P. 27-2, U.S. Census of Population: No. of Inhabitants, Mo., Final Report PC(1)-27A, U.S. Government Printing Office.)

1st—439,746
2nd—436,448
3rd—436,099
5th—431,178

Average Population 435,868 (Ideal 431,981)

PREDOMINANTLY RURAL DISTRICTS

4th—419,721*
6th—422,238**
7th—436,769***
8th—445,523****
9th—428,223*****
10th—423,868

Average population—429,390 (Ideal 431,981)

* Contains 40,292 in Kansas City and 151,721 in Jackson County, Bureau of the Census Standard Metropolitan Statistical Areas

** Contains Clay County population 87,474 and Buchanan County, population 90,581, Bureau of the Census Standard Metropolitan Statistical Areas

*** Contains Greene County, population 126,276, Bureau of the Census Standard Metropolitan Statistical Area

**** Contains 88,659 in St. Louis County, and Jefferson County, population 66,377, Bureau of the Census Standard Metropolitan Statistical Areas

***** Contains 53,606 in St. Louis County and St. Charles County population 52,970, Bureau of the Census Standard Metropolitan Statistical Areas.

The lower Court's real complaint is for the violation of a constitutional standard apparently of its own creation, which is the right of urban voters to be cast insofar as possible into urban districts, and presumably, the comparable right of rural voters to be placed as nearly as possible in rural districts.

10. The court points out the simplicity of achieving "* * * exceedingly close to equal populations for adjoining districts * * *" because of the "* * * ability to shift precincts from one side of a district dividing line to the other * * *" (p. 7, Appendices to Jurisdictional Statement, 279 F.Supp. l.c. 972). The court notes in this regard that such was done in the Jackson-Clay County apportionments and directs attention to its previous reference to these apportionments in its own earlier congressional districting opinion (257 F.Supp. at 978, footnote 16). The reference therein is to cases with the style **Davis, et al. v. Curry, et al.**, No. 15745-1 and **Wnuk, et al. v. Bywaters, et al.**, No. 15902-2 (Unreported) which the court claims in the earlier opinion at 257 F.Supp. 978, Footnote 16, voluntarily resulted in "two representative districts that varied only 792 population from ideal average districts of 330,000 population" in Jackson County and a "deviation of only 166 from an ideal district of 43,237" in Clay County. Jackson County's 1960 population of 622,732 divided by two is 311,366, making it evident that the court's "ideal average" is an approximation. One wonders if what appears to be the precise variation figure of 792 in anyway approaches accuracy! The court also alludes to a clipping in the Kansas City Star of December 5, 1967, which

> "* * * reports that the new boundary lines for the Kansas City School Board divided the population within that school district 'into six subdistricts each with about 71,500 population. * * *'" (p. 27, Appendices to Jurisdictional Statement 279 F.Supp. at 972).

The court uses these two examples for the following thinly veiled admonishment of the 1967 Missouri General Assembly:

> "Local government public officials in this judicial district have consistently demonstrated that the one-man

one-vote constitutional principle can be applied without difficulty given the desire so to do." (p. 27, Appendices to Jurisdictional Statement, 279 F.Supp. at 972).

One can certainly not quarrel with the principle as thus expressed, but one could certainly question the "factual" examples upon which it is based, certainly an example which treats approximations and definity in the same breath and another example having its origin in a newspaper clipping with a phrase of such indefinite limits as "about 71,500". When precision is the standard by which the court has judged the Missouri Legislature, the court itself should abide by its own rigorous standard.

11. In a footnote (p. 3, Footnotes to Appendices to Jurisdictional Statement; 279 F.Supp. l.c. 958) to its finding that the legislature had used inaccurate population figures, the author of the majority opinion exchanged volleys with the author of the dissenting opinion so as to find that the legislature in all instances had received accurate population data from the urban areas of the state, namely, the City of St. Louis, St. Louis County and Jackson County. From this the Majority Judge went on to observe the following:

> "To state that the Legislature had but did not use accurate 1960 federal census figures is not to question the good faith of any member of the Missouri Legislature. That fact, it seems to us, forecloses that any public official other than the members of the Legislature can be charged with responsibility for the casual manner in which the important task of congressional apportionment was in fact approached by the 1967 General Assembly."

In a similar vein the Majority Judge later in the opinion concluded as follows:

> "• • • Indeed, the discharge of this delicate and quite

fundamental constitutional duty has been treated by three successive Missouri legislatures as a legislative step-child; apparently qualification for appointment to the committees which have unsuccessfully attempted to do the actual work seems to have been limited to those who insist upon believing that something less than full performance of the dual mandates of the Missouri and federal Constitutions is all that is required." (p. 16, Appendices to Jurisdictional Statement; 279 F.Supp. l.c. 966).

To the extent that either of these two foregoing observations of the Majority of the court represent findings that the 1967 Missouri Legislature gave only incidental heed to the problem of reapportionment, the court has superimposed its own predilections upon evidence not presented in this case. These findings represent nearly total blindness to the testimony of the five spokesmen of the legislature, members of both political parties and men who were not politically or philosophically aligned to one another. Their collective testimony clearly and unmistakably evinces that they and their colleagues approached the task of reapportionment with dedication, perserverance and unquestionable attention throughout the six-month biennial session. The court's regard for the legislative process and specifically its attitude toward the Missouri Legislatures of past years and of present is succinctly revealed in a footnote that concludes with the following statement (p. 3, Footnotes to Appendices to Jurisdictional Statement; 279 F.Supp. 959).

"* * * In reflective moments, we have pondered what response would be given by members of the General Assembly to an effort that would attempt to justify a refusal to enforce a law enacted by that legislative body on the ground that it was politically inexpedient, as a

matter of practical politics, for the offender to have complied with such a law."

This court has thereby confessed its allegiance to the startling principle that legislators are now to be likened to persons hauled in to the courts of justice to answer charges made against them of violation of one or more laws, and, in its import, plainly refuses the traditional respect normally accorded lawmakers and their products. It is though the court alone has access to the Constitution with no possibility that legislative bodies can perceive and implement its meaning.

12. In summation of that portion of its findings labeled Appendix A the court once again, without justification, reprimanded the 1967 Missouri General Assembly for their failure to draw compact and contiguous districts, and makes reference in this regard to an old Missouri Supreme Court opinion on the subject of gerrymander. (State ex rel. **Barrett v. Hitchcock,** 146 S.W. 40 (Mo. 1912) pp. 31-32 Appendices to Jurisdictional Statement; 279 F.Supp. at 975). In a footnote the court quotes from this earlier Supreme Court of Missouri case and cites it for the proposition that state courts fifty years ago easily understood state constitutional requirements on legislative apportionment to be mandatory rather than directory. The **Barrett** case was a judicial examination of the apportionment of the Missouri Senatorial districts in 1910, when the state's population was 3,293,334, and each of the 34 Senatorial Districts ideally consisted of 96,862 persons. The particular districting plan under review had allotted only six Senatorial Districts to the City of St. Louis which had a population of 687,029 (An average variation of 18.2% from the ideal) whereas, the allotment of seven Senatorial districts to the city would have left only 8,995 in excess of perfect apportionment. Thus, the case represents solid precedent for principles alone and is not one

having any close factual similarity to the 1967 Missouri Congressional Districting Act.

Appellants consider especially significant though in this earlier Missouri Supreme Court opinion language (from the Michigan case, **Giddings v. Blacker**, 52 N.W. 944) which the lower court in this case carefully edited out of its quotation from that earlier opinion. Appellants therefore wish to quote the earlier opinion, as did the lower court in this case, but with the inclusion of omitted parts that are herewith underlined (p. 10, Footnotes to Appendices of Jurisdictional Statement).

> "* * * the time for plain speaking has arrived in relation to the outrageous practice of gerrymandering, which has become so common, and has so long been indulged in without rebuke, that it threatens, **not only the peace of the people**, but the permanency of our free institutions. **The courts alone, in this respect, can save the rights of the people, and give to them a fair kind of equality of representation.** * * *
>
> * * * There is not an intelligent schoolboy but knows what is the motive of these legislative apportionments; and it is idle for the courts to excuse the action upon other grounds, or to keep silent as to the real reason * * *", Emphasis added (146 S.W. at 57).

Judicial intolerance of a sister branch of government could hardly be more strongly expressed! The appelants are struck by the apparent kinship in philosophy between the judicial author of earlier times and the judicial author of the opinion now on appeal, a philosophy that virtually denies the capability of legislative bodies to establish legislative boundaries in a constitutional fashion.

The Court refers to the **Barrett** case in another section of the Findings of Fact as illustrating ". . . why a Missouri

Court fifty years ago had no difficulty with the 'as nearly equal as may be' language in the 1875 Missouri Constitution." (p. 51, Appendices to Jurisdictional Statement; 279 F.Supp. at 986). On this same pilgrimage into the past, the Court plumbs two Federal cases to show that ". . . Federal courts had no difficulty whatsoever in either understanding that language ["as nearly as practicable"] or in applying the standard it established to the facts presented by particular cases." (p. 56, Appendices to Jurisdictional Statement; 279 F.Supp. at 989). **Broom v. Wood**, 1 F.Supp. 134 (SD Miss. 1932), one of the two cases, involved Mississippi's then seven congressional districts, each of which would ideally have contained 287,117 inhabitants by virtue of a total state population of 2,009,821. The most populated district in the judicially invalidated act contained 414,000 [+44% above the ideal] persons and the least populated had 184,000 [−36% below the ideal]. The other case, **Hume v. Mahan**, 1 F.Supp. 142 (ED Ky. 1932) was a review of Kentucky's 1932 congressional District Act. The 1930 census of Kentucky was 2,614,589 and nine congressmen were apportioned to the state. Although each district should have ideally contained 290,510, the one judge Federal Court approved Jefferson County (Louisville) with a population of 355,350 as one congressional district out of respect for the preservation of county lines. Then, with 2,259,239 of the state's population remaining, and the eight districts therein ideally containing 282,405 persons, the Court invalidated the act because it had a most populated district of 352,869 [plus 24%] and a least populated district of 238,000 [minus 13%]. Because of the marked factual dissimilarity of all these earlier cases, appellants believe the lower court's point is lost. Missouri's 1967 Congressional Districting Act is hardly the black and white situation of those cases but more likens to the dilemma confronting a still earlier state court.

"'While it is impossible, in the nature of the case, to accurately describe and closely limit the amount of deviation from an equal representation that the practical working of the Constitution may in this respect permit, it is, on the other hand, sometimes quite possible to say of a particular example that it does or does not violate the constitutional mandate. We have no trouble whatever in detecting the difference between noon and midnight; but the exact line of separation between the dusk of the evening and the darkness of advancing night is not so easily drawn.' **Baird v. Kings County (People ex rel. Baird v. Broom)**, (1893) 138 N.Y. 95, 20 L.R.A. 81, 33 N.E. 827.

The court devotes considerable attention to a semantic comparison of the words "practicable" and "practical" to reach the conclusion, as appellants view it, that the equality of population standard contained in Article I, Section 2, of the United States Constitution is the antithesis of practical politics, and that the appearance of any political expediency or legislative compromise accompanied by some deviation from absolute mathematical equality renders a reapportionment act invalid (p. 6, Footnotes to Appendices to Jurisdictional Statement; 279 F.Supp. l.c. 962). In effect, the court has defined practicable to mean theoretical and with this the appellants take issue. Whoever may have coined or initiated the phrase "as nearly equal as practicable" surely could not have thereby intended exclusion of all practicality.

"* * * PRACTICABLE, from **practice (v. To exercise)**, signifies to be able to put in practice:

* * *

"The **practicable** is that which may or can be **practised**; the PRACTICAL is that which is intended for **practice**: the former, therefore, applies to that which men devise

to carry into **practice**; the latter to that which they have to **practise**: projectors ought to consider what is **practicable**; divines and moralists have to consider what is **practical**. The **practicable** is opposed to the **impracticable**; the **practical** to the theoretical or speculative." Crabb's English Synonymes, Harper & Brothers, New York, 1889, p. 674.

"**2 Practicable, practical** are not synonyms in good current use, but they are sometimes confused when they imply a capacity for being used or turned to account. **Practicable** (see also POSSIBLE, 1) applies chiefly to things which have not been worked out (as a plan, project, scheme, design) or which have been recently devised, invented, constructed, or the like (such as a new machine, a new form of entertainment, a new implement), and about which one of the following questions arises: is it capable of being developed or worked out, or is it likely to prove successful in operation or use; thus, many plans for the eradication of poverty are dismissed as "not **practicable**" (or "**impracticable**"); the possibility of wireless telegraphy was questioned until Marconi demonstrated its **practicability**; no **practicable** winter automobile that operates on runners rather than on wheels has yet been devised. **Practical** applies not only to things (concrete and immaterial) but also, as **practicable** never does, to persons. The term in all of its senses stresses an opposition to that which is **theoretical, speculative, ideal, unrealistic, imaginative**, or the like, and implies a relation to the actual life of man, his daily needs, or the conditions which must be met. When the term also implies a capacity for use, it emphasizes actual usefulness rather than highly probable or merely discovered usableness; thus, the automobile when first invented was not regarded as **practicable** by many persons but as a result of numerous improvements in the course

of time it is now regarded as a most **practical** vehicle for pleasure, business, transportation, and the like; 'Without his [Faraday's] researches in magnetic electricity we might have missed . . . those most **practical** machines of our modern life, the dynamo and the telephone' (**H. Ellis**). Hence, **practical** may apply to anything that is such in kind, character, amount, effect, or the like, that it is definitely useful or serviceable in actual life; as, very few students of French gain a **practical** knowledge of it unless they spend at least a year in France; 'In everything he undertook he demanded a utilitarian purpose and a **practical** result' (**Buchan**); 'These writers cannot confirm any one in the faith; they can merely have the **practical** value of removing prejudices from the minds of those who have not the faith but who might possibly come to it' (**T. S. Eliot**); 'With . . . the real, **practical** kindness of leaving some money for her board . . . they moved on' (**Deland**).

Webster's Dictionary of Synonyms, G. & C. Merriam Co., 1942, p. 639.

The lower court manifestly has accorded to the word practicable a meaning which is impossible of execution by legislative bodies. Practicable in the court's sense could only be achieved by computers or academic theoreticians, not bound to the desires or preferences of any group or factions. Legislative bodies, as representatives, are by definition obligated to diverse and often conflicting interests. Practicality is their way of life, and the constitutional standard of practicability must, for them, comprehend some degree of practicality.

The lower court obviously is not in harmony with **Exon v. Tiemann**, 279 F.Supp. 612 which rejected similar views by the plaintiff as follows:

"Plaintiff in approaching the problem argues that the word 'practicable' should be interpreted to mean 'pos-

sible' when applied to redistricting plans. He argues that the plan which the Legislature considered most practicable would have to be the most precise plan mathematically possible and that a plan such as L.B. 1, which is not the most precise plan mathematically possible, should be held unconstitutional unless the defendants justified the deviation."

14. The lower court makes a great ado over the inaccurate population calculations of districts in the 1967 Act by the Missouri General Assembly. These inaccurate calculations are erroneously referred to as the failure to use correct census data. The court also appears to indicate that the populations as intended by the legislature of the proposed districts which would have resulted in a ratio of 1.04 to 1 might have met the population requirements of the Constitution, whereas the districts as accurately calculated with a ratio of 1.06 to 1 are clearly in violation of the population requirements of the Constitution.

Admittedly the inaccurate population calculations were made. However, far too much significance is attached to these minor miscalculations by the court. Maximum populations of 2% from an ideal district became 3% from an ideal district. These calculations are based upon census figures which were over seven years old.

The following statistics are from U.S. Bureau Census, County and City, Date of Book 1967 (A statistical abstract supplement) U.S. Government printing offices, Washington, D.C., 1967.

Item 8 of Table 2 in the work cited indicated the natural increase in population between 1960 and 1965. The figure for the state as a whole (Page 202) is 5.1%. The changes in population for different counties during this period vary from a decrease of 1.7% (Daviess County) to an increase of 13.2%

for St. Charles County. Some other variances are as follows:

Grundy Co. 1.4% decrease	Hockory Co. 1.2% decrease
Mercer Co. 1.4% decrease	Linn Co. 1.5% decrease
Audrain Co. 5.1% increase	Boone Co. 815 increase
Cass Co. 5.9% increase	Clay Co. 8.7% increase
Cole Co. 5.6% increase	Dunklin 5.1% increase
Franklin Co. 6.9% increase	Jackson Co. 6.5% increase
Mississippi Co. 6.9% increase	New Madrid 7.0% increase
Osage Co. 5.6% increase	Pemiscot 7.3% increase
Perry Co. 5.6% increase	Phelps 6.1% increase
Platte Co. 6.9% increase	Jefferson Co. 9.2% increase
St. Louis Co. 7.7% increase	Ste. Genevieve 6.7% increase
Scott Co. 7.3% increase	Washington 6.0% increase

Therefore, it is demonstrated that the 1960 census population figures, as of 1965, could be as far off as 15%. To divide an object within 3% accuracy, when the object itself cannot be measured within 15% accuracy, is certainly within permissible tolerances. In its concern over a defectively sighted weapon, the court has put a telescopic sight on a shotgun.

Reason dictates that a de minimis standard or a judicial tolerance of minor variations, must apply to congressional reapportionment for the reason that the subject matter, namely population, is never capable of precise measurement. The subject matter is always in a state of change. Of necessity, we are dealing with approximate measures and numbers in motion. Population, like a river, continually flows. It is sometimes high, sometimes low, but always changing. A perfect apportionment would be to accurately measure the population on election day and divide the state into absolutely equal districts on that date. Such a perfect apportionment is, of course, impossible of practical attainment. Any apportionment short of the perfect apportionment will have mathematical differences.

It is recognized that apportionment need not be done more frequently than decennially. Within a period of ten

years, there will be considerable change in the population and the apportionment will in all likelihood have considerable mathematical inequalities at the end of the period. Apportioning without recognition of the fact that population continually changes is like buying shoes for a growing boy that fit like a glove. They would be outgrown immediately, and certainly we cannot expect them to be worn for ten years. In this particular case, it is eight years since the state's foot was last measured. It is self-evident that the 1960 measurement is no longer accurate.

To require perfect apportionment at the beginning of the decennium is unrealistic. To require such eight years later is doubly so. The lower court's rejection of the 1967 Missouri Act because of a maximum population variation of 25,000, or 6 per cent, is a virtual quest for perfect apportionment in a world that does not exist.

CONCLUSION.

This appeal seeks a reversal of the judgment and opinion of the lower court which invalidated the 1967 Missouri Congressional Redistricting Act. The grounds for the reversal of this judgment have been substantiated in this argument by reason and by applicable authorities. Bases for reversal of the lower court are as follows:

1. The 1967 Missouri Congressional Redistricting Act created districts which meet the population requirements of Article I, Section 2, Constitution of the United States. The variations in the population of the various districts are minor and do not infringe upon the right to vote inherent in the citizens of the various districts. Furthermore, the variations in the population of the districts are justified upon considerations by the Missouri General Assembly to create districts which were compact and contiguous, which maintain the integrity of county lines outside the major metropolitan areas of St. Louis and Kansas City, which gave recognition to historical and traditional factors and which gave recognition to other legitimate considerations relevant to the particular districts created. A consideration of the constitutional validity of the population makeup of these districts is supported by a further recognition that the census data with which the legislature was working was over seven years old and that such data will be made current in 1971.

2. The decision of the lower court should be reversed because it is based upon an erroneous principle that congressional districts do not meet the population requirements of the United States Constituion if better plans in terms of population equality have been presented to the legislature or to the court. Not only is this principle erroneous but also the court erroneously found that such better plans were in fact presented to the legislature.

3. The decision of the lower court erroneously rejected the principle that **de minimis** or minor population variations in congressional districts are constitutionally permissible **per se.**

4. The court erroneously rejected as a legitimate consideration in congressional reapportionment legislative interplay and reasonable legislative compromise in the process of congressional reapportionment enactments.

5. The findings of fact and the conclusions of the court are based upon many inaccuracies, distortions and irrelevancies reached by the court in its opinion and as detailed by appellants in the fifth argument of this brief. Thus, the opinion is unsound in fact and in law.

Appellants respectfully submit that the court should enter its judgment reversing the judgment of the lower court and remanding this cause with instructions to the lower court to enter its judgment finding that the 1967 Missouri Congressional Redistricting Act meets the constitutional requirements of Article I, Section 2, Constitution of the United States.

Respectfully submitted,

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Nos. 1116 and 1117

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

JAMES C. KIRKPATRICK, Secretary of State of Missouri, and NORMAN H. ANDERSON, Attorney General of Missouri,
Appellants (No. 1116),

AND

F. V. HEINKEL, R. J. ROSIER, et al.,
Appellants (No. 1117),

VS.

PAUL W. PREISLER, LOUISE ERBE, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, CENTRAL DIVISION.

BRIEF OF APPELLANTS F. V. HEINKEL, ET AL.

PREAMBLE

This is an appeal from the judgment of the United States District Court for the Western District of Missouri, Central Division, entered on December 20, 1967, finding

that the 1967 Missouri Congressional Redistricting Act is unconstitutional and void. Probable jurisdiction was noted on March 4, 1968.

OPINION BELOW

The opinion delivered by the lower court has not been reported either officially or unofficially. It has been printed and filed herein as Appendices to the Jurisdictional Statement of Appellants James C. Kirkpatrick, Secretary of State of Missouri, and Norman H. Anderson, Attorney General of Missouri. The opinion, judgment and decree of the lower court appears at pages 1 to 22 inclusive; the findings of fact of lower court appear at pages 23 to 82 inclusive; the dissenting opinion of Judge M. C. Matthes appears at pages 82 to 95 inclusive; and comments of Honorable William R. Collinson in clarification of his concurrence appear at pages 97 and 98 of that Appendices to Jurisdictional Statement.

Prior opinions in this same litigation were referred to by the lower court as, and may be found at, *Preisler I*, 238 Federal Supplement 187 (W.D. Mo., 1965) and *Preisler II*, 257 Federal Supplement 953 (W.D. Mo., 1966).

GROUNDS FOR JURISDICTION OF THIS COURT

This is a congressional redistricting case involving the constitutionality of Missouri's 1967 Congressional Redistricting Act, Sections 128.202 to 128.303, V.A.M.S., 1967. The proceeding was brought pursuant to 28 U.S.C., Section 1343(3); Article III, Section 2, of the Constitution of the United States; and 42 U.S.C., Sections 1983, 1988 and 2201. The three-judge court was convened under 28 U.S.C., Sections 2281 and 2284.

The date of the judgment sought to be reviewed and the date of its entry is December 20, 1967. There was no motion or order with respect to rehearing. The notice of appeal filed by these appellants was filed on January 22, 1968. The notice of appeal filed by appellants Secretary of State and Attorney General was filed on January 12, 1968. Both notices of appeal were filed in the Central Division of the United States District Court for the Western Division of Missouri.

This Court noted probable jurisdiction on March 4, 1968. Designation of portions of the record to be included in the Appendix were made on March 14, 1968. A cross-designation was made by appellees on March 23, 1968.

The statutory provision conferring jurisdiction of this appeal on this Court is 28 U.S.C., Section 1253. The case sustaining the jurisdiction is *Wesbery* v. *Sanders*, 374 U.S. 802.

STATUTES INVOLVED

This case involves the constitutionality of the 1967 Missouri Congressional Redistricting Act. It may be found in the official publication, Missouri Revised Statutes—Cumulative Supplement, 1967, at pages 374 and 375 (Chapter 128). It may also be found in the pocket part of 8A Vernon's Annotated Missouri Statutes, page 18, as Sections 128.202 to 128.303. That Act is set out below verbatim:

(Chap. 128, Mo. Rev. Stats., Cum. Supp. 1967, pp. 374-375)

[TRULY AGREED TO AND FINALLY PASSED]
HOUSE SUBSTITUTE FOR
SENATE COMMITTEE SUBSTITUTE FOR
SENATE BILL No. 182
74th GENERAL ASSEMBLY
AN ACT

To repeal sections 128.202, 128.212, 128.222, 128.232, 128.242, 128.252, 128.262, 128.272, 128.282, 128.292 and 128.302, RSMo, 1965 Supp., relating to congressional districts and to enact in lieu thereof eleven new sections relating to the same subject.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. Sections 128.202, 128.212, 128.222, 128.232, 128.242, 128.252, 128.262, 128.272, 128.282, 128.292 and 128.302, RSMo, Supp. 1965, are repealed and eleven new sections enacted in lieu thereof, to be known as sections 128.203, 128.213, 128.223, 128.233, 128.243, 128.253, 128.263, 128.273, 128.283, 128.293 and 128.303, to read as follows:

128.203. The state of Missouri is hereby divided into ten congressional districts, the legal voters of each district to elect one member of Congress of the United States.

128.213. The first district shall be composed of the following wards in the city of St. Louis: 1, 2, 3, 4, 18, 19, 20, 21, 22, 25, 26 and 27, of precincts 3 through 18 of ward 5; and of Washington township and St. Ferdinand township in St. Louis county.

128.223. The second district shall be composed of the following townships in St. Louis County: Airport, Clayton, Creve Coeur, Ferguson, Gravois, Hadley, Jefferson, Lin-

coln, Midland, and Normandy, and the following precincts of Bonhomme Townships 1, 2, 3, 6, 7, 8, 19, 41, 48, 59, 77, 89, 90, 91, 93.

128.233. The third district shall be composed of the following wards in the city of St. Louis: 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 23, 24 and 28, of precincts 1, 2, 19 and 20 of ward 5; and of Lemay township in St. Louis County.

128.243. The fourth district shall be composed of the following wards in the city of Kansas City: Wards 15 and 24; and the following townships in Jackson County, to wit: Washington, Blue, Brooking, Fort Osage, Van Buren, Prairie and Sni-A-Bar; and the following counties: Cass, Bates, Vernon, St. Clair, Henry, Johnson, Lafayette, Saline, Barton, Benton and Pettis.

128.253. The fifth district shall be composed of the following wards in the city of Kansas City: Wards 1 through 14, inclusive; 16 through 20, inclusive; and Wards 22, 23 and 25.

128.263. The sixth district shall be composed of the following counties: Atchison, Holt, Nodaway, Andrew, Buchanan, Platte, Worth, Gentry, DeKalb, Clinton, Clay, Harrison, Daviess, Caldwell, Mercer, Grundy, Livingston, Linn, Ray, Putnam, Sullivan, Chariton and Carroll.

128.273. The seventh district shall be composed of the following counties: Laclede, Jasper, Newton, McDonald, Cedar, Dade, Lawrence, Barry, Camden, Hickory, Polk, Greene, Christian, Stone, Taney, Dallas, Webster, Wright, Douglas and Ozark.

128.283. The eighth district shall be composed of the following counties: Cooper, Morgan, Moniteau, Miller, Cole, Maries, Pulaski, Phelps, Texas, Dent, Crawford,

Washington, Boone, Howard and Jefferson; and the following townships in St. Louis County: Concord and Meramec, and all of Bonhomme except precincts 1, 2, 3, 6, 7, 8, 19, 41, 48, 59, 77, 89, 90, 91 and 93.

128.293. The ninth district shall be composed of the following counties: Macon, Adair, Schuyler, Scotland, Clark, Knox, Lewis, Shelby, Marion, Randolph, Monroe, Ralls, Audrain, Pike, Callaway, Osage, Montgomery, Lincoln, Warren, Gasconade, Franklin and St. Charles; and the following townships in St. Louis County: Spanish Lake and Florissant.

128.303. The tenth district shall be composed of the following counties: Howell, Shannon, Reynolds, Iron, St. Francois, Ste. Genevieve, Perry, Cape Girardeau, Madison, Wayne, Carter, Oregon, Ripley, Butler, Bollinger, Stoddard, Scott, Mississippi, New Madrid, Pemiscot and Dunklin.

QUESTIONS PRESENTED FOR REVIEW

1.

Does the Missouri 1967 Congressional Redistricting Act (Sections 128.202 to 128.303, V.A.M.S., 1967) under which the average variation from ideal is 1.6%, the ratio of the largest to the smallest district is 1.06% to 1, 59% of the total population of the State is required to elect a majority (6 out of 10) of the congressional delegation, the largest variation from ideal was 3.13% above (the district which contains approximately 40,000 soldiers at Fort Leonard Wood, the State Capitol at Jefferson City and approximately 17,000 students at the University of Missouri at Columbia) and the lowest was 2.84% below, one-half of the districts are above ideal and one-half of the districts are below ideal, and 7 of the 10 districts are within 1.88%

of ideal, violate Article I, § 2 of the United States Constitution as construed in *Wesberry* v. *Sanders*, 376 U.S. 1 (1964)?

2.

In *Connor* v. *Johnson*, No. 3830 decided by a three-judge court in the Southern District of Mississippi on September 28, 1966, and affirmed by the Supreme Court at 386 U.S. 483 (1967), the average variation from the ideal population per district, the disparity ratio and the maximum and minimum variations were greater than those which result from Missouri's 1967 Act. That being true, does the judgment appealed from herein result in the application of a double standard by the Federal Judiciary? That is, that which is permissible in Mississippi is not permissible in Missouri?

3.

Does the doctrine of de minimis apply to congressional reapportionment, as suggested by the lower court herein in *Preisler II*, 257 F. Supp. 953 (1966) and, if so, do the population variations resulting from the Missouri 1967 Act violate that doctrine?

4.

Is there a presumption that the Missouri 1967 Act is constitutional and do those asserting unconstitutionality have the burden of demonstrating it?

5.

The undisputed testimony of the officers of the legislature was that the Act, as passed, apportioned the population as nearly equal as is "practicable" from the stand-

point of getting an Act passed. There was no evidence to the contrary, although plaintiff-appellees served notice that they would introduce evidence at the hearing they elected not to do so. This being true and the average variation from ideal being only 1.6%, the disparity ratio being only 1.06% to 1, 7 of the 10 districts being within 1.88% of ideal and the maximum variations being 3.13% above and 2.84% below, was it proper for the lower court to declare the Act unconstitutional?

STATEMENT OF THE CASE

Missouri has 10 congressional districts. The population of the State is 4,319,813. Accordingly, an Ideal district would contain 431,981 people (Ex. 13, A. 51).

When the current chapter of this litigation was commenced there was an error in the population of some of the districts. This was discovered at the pre-trial stage. It was stipulated by all parties that in order to correct this error and to be certain of the number of people actually living in each district under the 1967 Act the Bureau of the Census would be requested to certify as to the number of people living in each of the districts, according to the 1960 census. This was done and that Bureau so certified.

The population figures submitted by the Bureau of the Census under date of October 6, 1967, are as follows (Ex. 13, A. 51):

District No.	Population	Per Centage of Variation from Ideal
One	439,746	+ 1.8
Two	436,448	+ 1.03
Three	436,099	+ .95
Four	419,721	- 2.84
Five	431,178	- .19
Six	422,238	- 2.26
Seven	436,769	+ 1.11
Eight	445,523	+ 3.13
Nine	428,223	- .87
Ten	423,868	- 1.88
Total:	4,319,813	

Ideal population per district:	431,981
Average variation from Ideal:	1.6%
Ratio of largest to smallest district:	1.06 to 1
Per centage of total population required to elect majority of congressional delegation:	59%
Number of districts above Ideal:	5
Number of districts below Ideal:	5
Mean between the average per centage above Ideal and average per centage below Ideal:	0
Number of districts within 1.88% of Ideal:	7
Population difference between largest and smallest districts:	25,802

The Opinion in this case handed down August 5, 1966, *Preisler II*, and reported at 257 F. Supp. 953, l. c. 957, involving the 1965 Act was determined upon the following figures and statistics:

District No.	Population	Per Centage of Variation from Ideal
One	474,895	+ 9.94
Two	460,501	+ 6.61
Three	469,886	+ 8.78
Four	402,813	- 6.74
Five	405,780	- 6.06
Six	394,236	- 8.73
Seven	425,820	- 1.42
Eight	443,747	+ 2.73
Nine	451,893	+ 4.62
Ten	389,880	- 9.74
Total:	4,319,451	

Ideal Population per district:	431,945
Average variation from Ideal:	6.54%
Ratio of largest to smallest district:	1.218 to 1
Per centage of total population required to elect majority of congressional delegation:	57%
Number of districts above Ideal:	5
Number of districts below Ideal:	5
Mean between the average per centage above Ideal and average per centage below Ideal:	0
Number of districts within 6.74% of Ideal:	6
Population difference between largest and smallest districts:	85,015

The 1961 Redistricting Act declared invalid on January 4, 1965, *Preisler I*, and reported at 238 F. Supp. 187, l.c. 188, was determined upon the following figures and statistics:

District No.	Population	Per Centage of Variation from Ideal
One	466,482	+ 7.99
Two	506,854	+17.33
Three	480,222	+11.17
Four	418,981	- 3.01
Five	378,499	-12.38
Six	388,486	-10.07
Seven	436,933	+ 1.15
Eight	452,285	+ 4.7
Nine	409,365	- 5.24
Ten	381,602	-11.66
Total:	4,319,709	

Ideal population per district:	431,981
Average variation from Ideal:	8.47%
Ratio of largest to smallest district:	1.339 to 1
Per centage of total population required to elect majority of congressional delegation:	56%
Number of districts above Ideal:	5
Number of districts below Ideal:	5
Mean between the average per centage above Ideal and average per centage below Ideal:	0
Number of districts within 10.07% of Ideal:	6
Population difference between largest and smallest districts:	128,355

Obviously, the Missouri legislature has accomplished a great deal since January 4, 1965. Since that date the difference in population between the largest and smallest districts has decreased from 128,355 to 85,015 to 25,802; the number of districts within a certain percentage of an ideal district has gone from 6 within 10.07% to 6 within

6.74% to 7 within 1.88%. The disparity ratio between the largest and smallest districts has gone from 1.339 over 1 to 1.218 over 1 to 1.06 over 1 and the average variation from the ideal district has decreased from 8.47% to 6.54% to 1.06%.

Fort Leonard Wood is located within the eighth district. It has approximately 40,000 soldiers, many of whom are non-residents of the state of Missouri and are ineligible to vote upon congressmen in Missouri (A. 74, 75). Also included in the population figures for the eighth district are many state employees who maintain their voting residences in their home counties outside of that district as well as the University of Missouri with its principal campus at Columbia, its campus at Rolla and also Lincoln University in Jefferson City (A. 82, 83, 98). A high per centage of these students are not old enough to vote, and most of those who do vote do so in the counties of their home residence.

The undisputed evidence was that in considering and adopting the 1967 Act the legislature gave primary consideration to equality of population (A. 72, 81, 82); and that it gave subordinate consideration to the maintenance of compactness and contiguity (A. 72, 83) and natural and historic boundary lines (A. 72, 83, 84).

ARGUMENT

Prior to the judgment and opinion appealed from herein no court, federal or state, had declared unconstitutional a congressional redistricting act which produced the minimal deviations from Ideal which result from the 1967 Missouri Act. In each of the cases cited in the majority opinion of the lower court the Act declared unconstitutional resulted in deviations from Ideal much, much greater than those produced by the 1967 Missouri Act. The major-

ity opinion cited no case in which the factual situation resulting from the Act was even close to the situation at Bar. Very conspicuously the majority opinion did not cite nor discuss *Connor* v. *Johnson*, 386 U.S. 483, 18 L. ed. 2d 224 (1967). It was buried in Appendix C where it was said to be inapplicable because of the majority's view of the technical nature of the rules of appellate practice. The dissenting opinion referred to that omission as "the herculean efforts of my brothers to sweep *Connor* v. *Johnson*, 386 U.S. 483 (1967), under the rug."

In that case the 1966 Mississippi Congressional Redistricting Act was attacked. According to the opinion of the lower court (in that case) the Complaint charged that "Each of the Congressional Districts should contain 435,628 persons, to be apportioned on a strict population basis." In footnote No. 1 the court said:

> "While the sole question before the Court was whether House Bill 911 of the Laws of Mississippi of 1966, as far as practicable, apportioned the State into Congressional Districts of equal population in compliance with *Wesberry* v. *Sanders*, there were numerous objections raised by both sides as to the admission of certain items of evidence."

The Court went on to say that:

> "We are of the view that the adjudication of this controversy is controlled by Wesberry v. Sanders, * * *."

It then cited other congressional reapportionment cases, all of which were based upon *Wesberry* v. *Sanders* and Article I, Section 2 of the Constitution of the United States.

On appeal to this court Appellant's Jurisdictional Statement said:

> "Nor does the legislature's adopted plan conform to standards of population equality when compared to the available alternatives. The difference between the

largest and the smallest district under the plan adopted is 28,061; the same figure for the Revised Delta Plan is 13,672, less than half. The greatest deviation from the norm in the adopted plan is 15,332; in the Revised Delta Plan, it is 7,572. The average deviation of all five districts in the adopted plan is 11,547; in the Revised Delta Plan, it is 3,767. Clearly, the desire to achieve mathematical population equality was not decisive for the Mississippi legislature in its choice of plans." P. 8, appellant's jurisdictional statement filed in the Supreme Court.

This court affirmed that judgment, *Connor* v. *Johnson*, 386 U.S. 483, 18 L. ed. 2d 224 (1967).

Under the Mississippi Act the population figures and statistics are as follows:

District No.	Population	Per Centage of Variation from Ideal
First	449,361	+ 3.15
Second	427,468	- 1.87
Third	428,447	- 1.65
Fourth	423,300	- 2.82
Fifth	449,565	+ 3.19
Total:	2,178,141	

Ideal population per district:	435,628
Average variation from Ideal:	2.53
Ratio of largest to smallest district:	1.06 to 1
Percentage of total population required to elect majority of congressional delegation:	58%
Number of districts above Ideal:	2
Number of districts below Ideal:	3
Mean between the average percentage above Ideal and average percentage below Ideal:	+1.06
Number of districts within 2.82% of Ideal:	3
Population difference between largest and smallest districts:	26,265

It has been stated in *Swann* v. *Adams*, 385 U.S. 440, l.c. 445, 17 L. ed. 2d 501, 87 S. Ct. 569 (1967), and *Reynolds* v. *Sims*, 337 U.S. 533, l.c. 578, 12 L. ed. 2d 506, 84 S. Ct. 1362, that the approval in one state of a particular percentage of variation from the norm has little bearing on the validity of a similar variation in another state. The reason for this is that the two states involved might have totally different subordinate considerations. That is, one state may have done a good job on compactness and contiguity whereas the other state didn't; one state may have given some recognition to natural or historical boundary lines whereas the other state didn't; one state may have preserved the integrity of political subdivisions whereas the other state didn't. Obviously if there is a difference in these subordinate considerations then the similarity of population statistics would not be near so significant, and certainly not controlling.

On the other hand, if State A did not consider compactness and contiguity, natural or historical boundary lines, or the integrity of political subdivisions, but, nevertheless, received the approval of this court of a population variation of X%, then State B should also receive approval of this court of a population variation of X minus 1 if it has also given consideration to these subordinate factors. In other words, the subordinate factors, which must be free from any taint of arbitrariness or discrimination, might justify a larger percentage of deviation, however, they would not render invalid a smaller percentage of deviation. To hold otherwise would penalize state B for having considered these legitimate factors—even though they were free from any taint of arbitrariness or discrimination.

The opinion of the lower court in the Mississippi case does not indicate that there was any evidence or consideration of compactness and contiguity, natural or histor-

ical boundary lines or the integrity of political subdivisions. A Fortiori that opinion does not indicate that the approval of the Mississippi Act resulted from a consideration of those subordinate factors. It follows that the Missouri Act, which results in smaller variations from Ideal and in the discussion and passage of which subordinate consideration was given to compactness and contiguity, natural and historical boundary lines and the integrity of political subdivisions, should also receive the approval of this court.

It is apparent that the congressmen in Mississippi will be elected in 1968 and 1970 under a redistricting act which produces greater variations from Ideal than does the 1967 Missouri Act. This will be done with the approval of both the three-judge district court *and also this court.* It is respectfully and urgently submitted that if the judgment of the lower court herein is not reversed the federal judiciary will have imposed a double standard of constitutionality. That which is permissible in Mississippi will not be permissible in Missouri. To avoid this the judgment of the lower court should be reversed.

Toombs v. *Fortson,* 241 F. Supp. 65 (N.D. Ga. 1965), was affirmed by this court at 384 U.S. 210, 16 L. ed. 2d 482 (1966). That case is authority for the proposition that a deviation from Ideal of 15% is permissible in a state legislative case. A Fortiori a maximum deviation of 3.13% with an average deviation of 1.6% is permissible in a congressional redistricting case.

In *Drum* v. *Seawell,* 271 F. Supp. 193 (M.D. N. Car., 1967) the 1967 North Carolina Congressional Redistricting Act was held to be valid. The deviations from ideal resulting from that Act are very close to those resulting from the 1967 Missouri Act. In North Carolina the ratio of

the largest to the smallest district is 1.04 to 1, the average variation from ideal is 1.06%, and the greatest variations are from a –1.86% to a +2.31%. The population difference between the largest and the smallest district is 17,276. Although the statistics in North Carolina are a shade better than those in Missouri surely it cannot be said that the difference between constitutionality and unconstitutionality can be sliced so thinly.

The Massachusetts case of *Dinis* v. *Volpe*, Civil Action No. 66-767-G was decided by the Federal District Court on October 3, 1967. It is not yet reported. In it the Massachusetts Congressional Redistricting Act was held valid. This holding was in spite of the fact that another plan had been presented to the Massachusetts legislature, which plan would have reduced by almost one-half the population variations in the district. This court affirmed that judgment on January 15, 1968, *Dinis* v. *Volpe*, ____ U.S. ....., 19 L. ed. 2d 785, 88 S. Ct. ..... This court's docket No. was 882.

In the Florida case, after holding the Act invalid the court decreed a Congressional Apportionment. Under the court decree it was thought that the variation between the largest and smallest districts would be 1.49%. After the decree was entered it was discovered that the population figures which the Court had used were substantially erroneous. Accurate population figures were obtained from the Bureau of the Census. When these accurate figure were applied to the plan decreed by the Court the variance between the smallest and largest district was revealed to be 11.83%. In the light of this information a motion to reconsider was filed. The lower court overruled that motion and an appeal was taken to this court. This court affirmed the lower court's judgment on January 15, 1968. In the lower court this case was *Gong* v. *Kirk*, Civil No.

64-143-CIV-EC. In this court it was *Kirk* v. *Gong*, docket No. 872, ... U.S. ....., 19 L. ed. 2d 784, 88 S. Ct. .....

In the case at bar the dissenting opinion of Circuit Judge M. C. Matthes is a scholarly and deadly-accurate statement of the applicable law. It recognizes that redistricting is a *legislative* function. Also, Judge Matthes' excellent opinion correctly analyzes the majority opinion as holding, in effect, and as a reality, that every apportionment act must be cast aside if the reviewing court can devise a scheme for more equal representation. That is precisely the result of the majority opinion.

CONCLUSION

It is respectfully submitted that the judgment of the lower court should be reversed, the Motion for Approval of Congressional Apportionment and for Termination of Proceedings (Ex. 5, A. 7) should be sustained and the 1967 Missouri Congressional Redistricting Act should be declared valid and constitutional.

Respectfully submitted,

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SUPREME COURT, U. S.

FILED

JUN 29 1962

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962

Nos. 36 and 37

JAMES C. KIRKPATRICK, Secretary of State of Missouri, and NORMAN H. ANDERSON, Attorney General of Missouri,
Appellants,

and

F. V. HEINKEL, R. J. ROSIER, W. W. BECKETT, A. D. SAPPINGTON, L. O. WALLIS, MILLER HERN, HERMAN HETLAGE, HERMAN KERTZ, TURPIN YOUTSEY and GLEN MYERS,
Intervenor-Appellants,

vs.

PAUL W. PREISLER, LOUISE ERBE, BOSTIC J. FRANKLIN, LUCILE RIEDEL, DOROTHY CHILDS, SARAH RIFKIN, and MARTHA LEONARD,
Appellees.

On Appeal from the United States District Court for the Western District of Missouri, Central Division.

APPELLEES' BRIEF ON THE MERITS.

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United States v. United States Gypsum Co., 333 U. S. 364, 92 L. Ed. 2d 746, 68 S. Ct. 525 (1948) 10

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Related Cases Not Cited.

Kirkpatrick v. Preisler, 385 U. S. 450, 87 S. Ct. 613, 17 L. Ed. 2d 511 (1967), affirming Preisler, II.

Preisler, I, v. Secy. of State of Mo., 238 F. Supp. 952 (W. D. Mo. 1965).

Preisler, II, v. Secy. of State of Mo., 257 F. Supp. 952 (W. D. Mo. 1966), aff'd. sub nom. Kirkpatrick v. Preisler, 385 U. S. 450, 87 S. Ct. 613, 17 L. Ed. 2d 511 (1967).

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

Nos. 1116 and 1117.

JAMES C. KIRKPATRICK, Secretary of State of Missouri, and NORMAN H. ANDERSON, Attorney General of Missouri,
Appellants,

and

F. V. HEINKEL, R. J. ROSIER, W. W. BECKETT, A. D. SAPPINGTON, L. O. WALLIS, MILLER HERN, HERMAN HETLAGE, HERMAN KERTZ, TURPIN YOUTSEY and GLEN MYERS,
Intervenor-Appellants,

vs.

PAUL W. PREISLER, LOUISE ERBE, BOSTIC J. FRANKLIN, LUCILE RIEDEL, DOROTHY CHILDS, SARAH RIFKIN, and MARTHA LEONARD,
Appellees.

On Appeal from the United States District Court for the Western District of Missouri, Central Division.

APPELLEES' BRIEF ON THE MERITS.

Preliminary Statement.

In view of the extensive discussion, explanation, and documentation contained in the majority opinion of the court below, Appellees will seek not to burden this Court with repetition thereof but will refer to appropriate por-

tions of the lower court's opinion in answer to much of what is presented in the points raised in Appellants' argument.

The attention of this Court is directed to the separate document containing the opinion, decision, and judgment of the court below, filed as a separate document by Appellants with their "JURISDICTIONAL STATEMENT," and entitled "APPENDICES TO JURISDICTIONAL STATEMENT" along with another separate document entitled "FOOTNOTES TO APPENDICES A AND B OF JURISDICTIONAL STATEMENT." Because of the dependence of these two documents on each other, they need be read together. This case is now reported in full in 279 F. Supp. 952 to 1012 (1968).

References to the opinion, decision, and judgment will be by citation to the "APPENDICES TO JURISDICTIONAL STATEMENT" and designated (A. J. S. ...), references to footnotes to the majority opinion by citation to "FOOTNOTES TO APPENDICES A AND B OF JURISDICTIONAL STATEMENT" and designated (F., A. J. S. ...).

References to the "APPENDIX (Rules 17 and 36)" are designated by (A. ...) and by (A. R. ...) when referring to the trial record portion of this Appendix. References to the respective "APPELLANTS' BRIEF ON THE MERITS" of Kirkpatrick and Anderson are designated (App. Br. ...) and "BRIEF OF APPELLANTS F. V. HEINKEL, ET AL." (App. H's. Br. ...).

General Statement.

The court below in its opinion, decision, and judgment, properly found that the 1967 Missouri Congressional Redistricting Act does not comply with Article I, Section 2 of the Constitution of the United States and is unconstitutional and void.

The majority opinion (A. J. S. 1-22) and findings of fact and discussion thereof (A. J. S. 23-82) and the comments of concurring Judge Collinson (A. J. S. 97-98) and footnotes thereto (F. A. J. S. 1-12) extensively and adequately present the law as applied to the facts of the instant case and the court reaches the appropriate determination and disposition of the issues in deciding that the Act is unconstitutional and void for violation of the aforesaid Article I, Section 2.

Appellees contend that the differences between several adjacent districts, such as 25,802 and 21,655 inhabitants, are gross and excessive and NOT "minor" or "de minimis" as Appellants claim. When many whole counties of from 4,516 to 10,850 inhabitants are situated on the boundary lines of adjacent districts and are thereby available for transfers between districts, which transfers would significantly diminish the differences between districts, the aforesaid differences of the Act cannot be legally justified under the constitutional requirements aforesaid. The population of a whole county cannot be considered trivial, "minor", or "de minimis."

Official United States Census Bureau population data for Missouri are and have been available for counties and townships of counties, and for wards, precincts, and blocks in the more densely populated areas, which data could have and should have been utilized for the construction of districts of lower population differences than those of the Act.

The majority opinion in its findings of fact (idem, pages 23 to 41) shows that the General Assembly had before it bills whose maximum district population differences were significantly smaller than the differences of the Act. Such bills served to bring to the attention of the legislators that districts of smaller differences could be easily made and that the districts of the Act were not as nearly equal as is practicable.

The constitutionality of the Act must be determined upon the population of the districts created by the Act. Difficulties inherent in the legislative process of the enactment of legislation do not excuse the failure to produce a constitutionally valid act. A citizen's constitutional rights cannot be abrogated nor violated for political expediency in the enacting process.

Unwarranted and unjustified population differences between adjacent districts, which differences can readily and easily be significantly diminished by the transfer of whole counties or other political subdivisions from one district to an adjacent district, conclusively prove that the districts have not been created as required by the aforesaid Article I, Section 2.

Appellees contend that the table of district populations and the map of the districts clearly demonstrate that the districts created by the Act are not as nearly equal as is practicable, because simple transfer of counties between adjacent districts would have created districts of significantly smaller population differences. (See table and map, pages 14 and 15, this Brief, for examples of such transfers.)

The position of Appellees is supported by the comments of Judge Collinson in his clarification of his concurrence in the opinion, decision, and judgment of the court below (A. J. S. 97). (Judge Collinson's comment also quoted on page 5, next page following, this Brief.)

ARGUMENT.

1.

The Trial Court Did NOT Adopt a Rule Holding That "Congressional Districts Are Not as Equal as Practicable if Any Other Plan Proposed Can Result in Districts With Smaller Population Variances."

Appellants argue (App. Br. 44-49) that the lower court's ruling is based on a holding that congressional districts are not as equal as practicable if any other plans proposed to the legislature or to the court can result in districts with smaller population variations. The court did NOT so hold.

Appellants misread the rules applicable to congressional redistricting applied by the lower court.

Appellants misconstrued evidentiary matters with rules of law. The trial court here considered the facts of other proposed plans along with all other evidence before it.

Judge Collinson's comment in concurring with the majority opinion (A. J. S. 97-98) makes this point clear when he says:

> "No one can believe or contend that the Supreme Court has said that the 'one-man one-vote' doctrine requires that Congressional districts be exactly equal in population; certainly the majority opinion does not so state. But neither has the Supreme Court said that there is a mathematical formula for inequality (within a certain percentage) which will satisfy the 'nearly equal as practicable' rule."

and on page 98,

> "I do not condemn the 1967 Act because there were more equal plans defeated in the Legislature; nor do I condemn it because it divides St. Louis County between a number of districts. I believe the plan is

> **unconstitutional because on its face and under the undisputed evidence it is not an attempt to divide the State of Missouri in Congressional districts that are as nearly equal in population as is practicable.** And this **for the reason that it is obvious that entire counties can be moved to adjoining districts with a resulting substantial decrease in the variances of population in the present Act** and because **there is no evidence in this record that can be said to explain or justify why this was not done.**" (Emphasis supplied.)
>
> "In short, the proponents of the 1967 act have failed to carry the burden of proof imposed on them by law."

The Appellants' argument takes out of context the statement of the majority opinion (A. J. S. 10-12) which rejects the overly broad concept of "de minimis" and completely ignores the full discussion of the burden of proof (A. J. S. 7-9) and the court's rejection of the political expediency argument (A. J. S. 6-7).

In citing language from **Exon v. Tiemann**, 279 F. Supp. 609, 612 (D. C. Nebr. 1968), appellants neglect to point out that in **Exon** no issue was presented and no evidence heard on the point of non-rational grounds or improper motives. The same situation pertains in each of the cited cases (App. Br. 47-48). Either no evidence of non-rational grounds was presented, or if presented, was rejected by the lower court.

Appellees do not argue that the legislature must adopt the most precise plan mathematically possible, but that a plan which deviates from attainable precision cannot be justified upon grounds or upon motives which are not constitutionally acceptable for variance.

Appellees further point out, as did the trial court at the hearing of the case (A. 70), that the Missouri legislature kept no report of its debates and proceedings and no formal committee reports other than mere recommenda-

tions as to passage. Consequently, neither the trial court nor this Court has any basis for justification, on rational grounds, of the variances between district populations found in the 1967 Act.

Contrary to the Appellants' inaccurate simplification of the trial court's ruling, it is clearly stated in its opinion (A. J. S. 17) as follows:

> "This Court obviously has no alternative other than to deny defendants' pending motion for the reasons that (1) we must find that **the 1967 Act does not in fact divide the population of Missouri into districts as nearly equal as is practicable**; and (2) because **the obviously avoidable population variances in the 1967 Act cannot be satisfactorily justified on any legally acceptable ground supported by any evidence in this record.** It is therefore totally impossible for this Court, on the basis of any substantial evidence, to relate any 'declared justification to any specific inequalities among the districts' or to 'articulate any satisfactory grounds for rejecting . . . other plans presented (both) to the court (and to the 74th General Assembly of Missouri) which would have produced substantially smaller deviations than those created by the 1967 Act. **Kilgarlin v. Hill**, supra, at page 124. Defendants have simply failed to carry the burden of proof imposed on them by **Swann v. Adams, III**, a case decided before Senate Bill No. 182 was introduced in the 1967 Missouri Legislature. We so find and determine." (Emphasis supplied.)

2.

A.

The Burden of Proof Is on Those Supporting An Apportionment Plan to Justify It on Rational Grounds.

The rule and authorities are concisely stated by the trial court's opinion (A. J. S. 9):

> "The principle is firmly settled that the proponents of a redistricting plan must sustain the burden of justifying **any** deviation from practicable equality of population. **Swann v. Adams**, supra, at 445; **Reynolds v. Sims**, supra, at 577-80; **Maryland Citizens Committee for Fair Cong. Redistr. v. Tawes**, 253 F. Supp. 731, 733 (D. Md. 1966), aff'd sub nom. **Alton v. Tawes**, 384 U. S. 315 (1966). This Court must also follow and apply **Kilgarlin v. Hill's** express requirement that before a particular plan may be approved as constitutional the District Court must be able, from the evidence adduced by the defendant, to articulate legally acceptable reasons for the specific variations in population between districts that have been shown to exceed the 'as nearly as is practicable' standard of Art. I., § 2."

Appellants argue (App. Br. 49-50) that "minor" variations in population are permissible without substantial evidence justifying the variances. Appellants thus seek a variation of the burden of proof formula proposed in **Kilgarlin v. Martin, Secy. of State of Texas** (S. D. Tex.), 252 F. Supp. 404, which was reversed (sub nom. **Kilgarlin v. Hill, Secy. of State of Texas**, 386 U. S. 120) by this Court which retained its basic standard enunciated in **Swann v. Adams, III**, 385 U. S. 440 (1967). To lay down so fixed a formula as proposed in **Kilgarlin v. Martin** would be to produce the disorder which inevitably results from an attempt to lock legal concepts into mathematical formulae. **Kilgarlin** (which was reversed) sought to establish three zones of consideration:

> (1) "De minimis" variations which are per se constitutionally permissible,
>
> (2) "Per se" variations at the other extreme which are not constitutionally permissible, and

(3) All situations in between, in which the burden is on the proponent to justify variations on constitutional grounds.

The obvious weakness in such a formula is that it must be applied to situations totally dissimilar to each other. What might be a minor variation under the circumstances of one state might well be a gross deviation in another. While "mathematical exactitude" may be unattainable, it certainly is capable of clear definition and, as a goal, it establishes a clear target at which to shoot. But the same cannot be said of "minor" or "de minimis" as standards of clarification. Each court must still decide on the basis of the particular facts and figures.

The formula fails for another reason. This Court has made it clear that state legislatures may not toy with the right of the voter to an equal vote. Good faith efforts are required. The concept of "one man—one vote" leaves no room for bad faith within a limited range. There must not be established any safety zone in which constitutionally unacceptable grounds may operate. To do so would be to take us back to the **pre-Baker** morass in which the deviations became progressively worse from year to year to the point where the responsiveness of state government to the will of the majority was not only threatened but frequently subverted. The court must not create any haven of refuge for those who resist the concept of voter equality.

B.

The Burden of Proof Is on Appellants.

The trial court, upon the testimony and the evidence before it, found that the legislature employed standards in redistricting which are not justifiable as constitutionally

acceptable grounds for variance from a population basis. The court said (A. J. S. 7):

> "We find that the defendants' evidence leads to the inevitable conclusion that a majority of the members of the legislature were motivated by considerations other than the constitutional objective of 'practicable equality' ".

Under time honored rules of appellate review, where a trial has been by a court without a jury, the court findings must stand unless "clearly erroneous". Fed. Rules Civ. Prac. 52 (a). Findings of fact in actions tried without a jury shall not be set aside unless clearly erroneous. A finding is only clearly erroneous, when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. **United States v. United States Gypsum Co.**, 333 U. S. 364, 395, 92 L. Ed. 746, 68 S. Ct. 525. This rule also applies to factual references from undisputed facts. Idem. 333 U. S. at 394.

The rule is particularly applicable in situations which are matters basically of fact, for determination on a case-by-case basis. In **Commissioner v. Duberstein**, 363 U. S. 278, 289, 4 L. Ed. 2d 1218, 1227, 80 S. Ct. 1190 this Court said:

> "Decision of the issue presented in these cases must be based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case. The nontechnical nature of the statutory standard, the close relationship of it to the data of practical human experience, and the multiplicity of relevant factual elements, with their various combinations, creating the necessity of ascribing the proper force to each, confirm us in our conclusion that primary weight in this area must be given to the conclusions of the trier of fact. Baker v. Texas & P. R. Co.,

359 U. S. 227, 3 L. Ed. 2d 756, 79 S. Ct. 664; Commissioner v. Heininger, 320 U. S. 467, 475, 88 L. Ed. 171, 177, 64 S. Ct. 249; United States v. Yellow Cab Co., 338 U. S. 338, 341, 94 L. Ed. 150, 153, 70 S. Ct. 177; Bogardus v. Commissioner, supra (302 U. S. at 45) (dissenting opinion).

"This conclusion may not satisfy an academic desire for tidiness, symmetry and precision in this area, any more than a system based on the determinations of various fact-finders ordinarily does."

The burden is on appellants to show that the findings of fact of the trial court upon which its judgment is based are clearly erroneous. **Murphy v. Shelby**, 353 F. 2d 418, 421 (C. A. Mo. 1965); **Montgomery Ward & Co. v. Steele**, 352 F. 2d 822, 826 (C. A. Mo. 1965); **Manning v. Jones**, 349 F. 2d 992, 995 (C. A. Mo. 1965).

In order for the reviewing court to set aside the findings of fact by the trial court sitting without a jury, it must be clearly demonstrated that such findings were without adequate evidentiary support in the record, or were induced by an erroneous view of the law, and the burden of showing that the findings are clearly erroneous is on the one attacking them. **Cedillo v. Standard Oil Co. of Texas**, 291 F. 2d 246, 248 (C. A. Tex. 1961), certiorari denied 368 U. S. 955, 82 S. Ct. 397, 7 L. Ed. 387 (1962).

3.

The "De Minimis" Doctrine Has No Relevance to Redistricting Matters.

Appellants attempt to start with the *de minimis* doctrine and to arrive at a formula for shifting of the burden of proof on a question of population variances.

Let us examine the doctrine. **Black's Legal Dictionary**, Fourth Edition, says:

"DE MINIMIS NON CURAT LEX. The law does not care for, or take notice of, very small or trifling mat-

ters. The law does not concern itself about trifles. Cro. Eliz. 353. Thus, error in calculation of a fractional part of a penny will not be regarded. Hob. 88. So, the law will not, in general, notice the fraction of a day. Broom Max. 142."

It is a long jump from calculating a fractional part of a penny, to determining the extent to which the right of a voter to an equal vote may be devaluated. The cases in point are quite limited. In **Schwartz v. Essex County Board of Taxation**, 129 N. J. L. 129, 28 A. 2d 482, 484, the Supreme Court of New Jersey examining a taxpayer's suit, said:

> "Respondents next assert that inasmuch as the prosecutor's assessment for the year 1940 was on a total valuation of $600, resulting in a tax to him of $29.10, that, applying the maxim de minimis non curat lex, the court should not burden itself with this problem. It is true that the pecuniary interest of the prosecutor is small. However, the constitutionality of a legislative act is called in question by the assertion that the legislature has exceeded its jurisdiction. **An attack upon the constitutionality of a legislative act is never unimportant**, and the standing of one otherwise qualified to question the legislation is not to be determined by the mere matter of dollars and cents involved. Cf. Cooley on Constitutional Limitations, 4th Ed., c. 14, pp. 646, 647" (Emphasis supplied).

Since **Baker v. Carr** the right of the individual voter to pursue legal action against inequitable redistricting has been clear. The right of voter franchise is never a trivial matter.

As pointed out by the lower court the use of the concept of "de minimis" in apportionment decisions can only be used to support minor variations from exact equality

where the variances result despite the application of proper constitutional principles. It may not be used to excuse the violation of those principles. There is no "de minimis" doctrine which supports a plan which is "a little bit unconstitutional".

Appellees believe the lower court has commented on every reported use of the phrase "de minimis" in apportionment cases (A. J. S. 9-11).

Variances which result from constitutionally unacceptable standards are not "de minimis". Paraphrasing this court's statement in **Lucas v. Colorado General Assembly**, 377 U. S. 713, 84 S. Ct. 1459, 12 L. Ed. 2d 632, 646, Appellees believe the rule should be that disparities from population based representation, though minor, may render the apportionment scheme constitutionally suspect if only justified on a non-rational basis. Variations to be constitutionally acceptable must be slight and based on constitutionally justifiable grounds.

4.

The Districts of the Act Are NOT as "Nearly Equal as Is Practicable", Because Transfer of Whole Counties Between Adjacent Districts Would Create Districts More Nearly Equal.

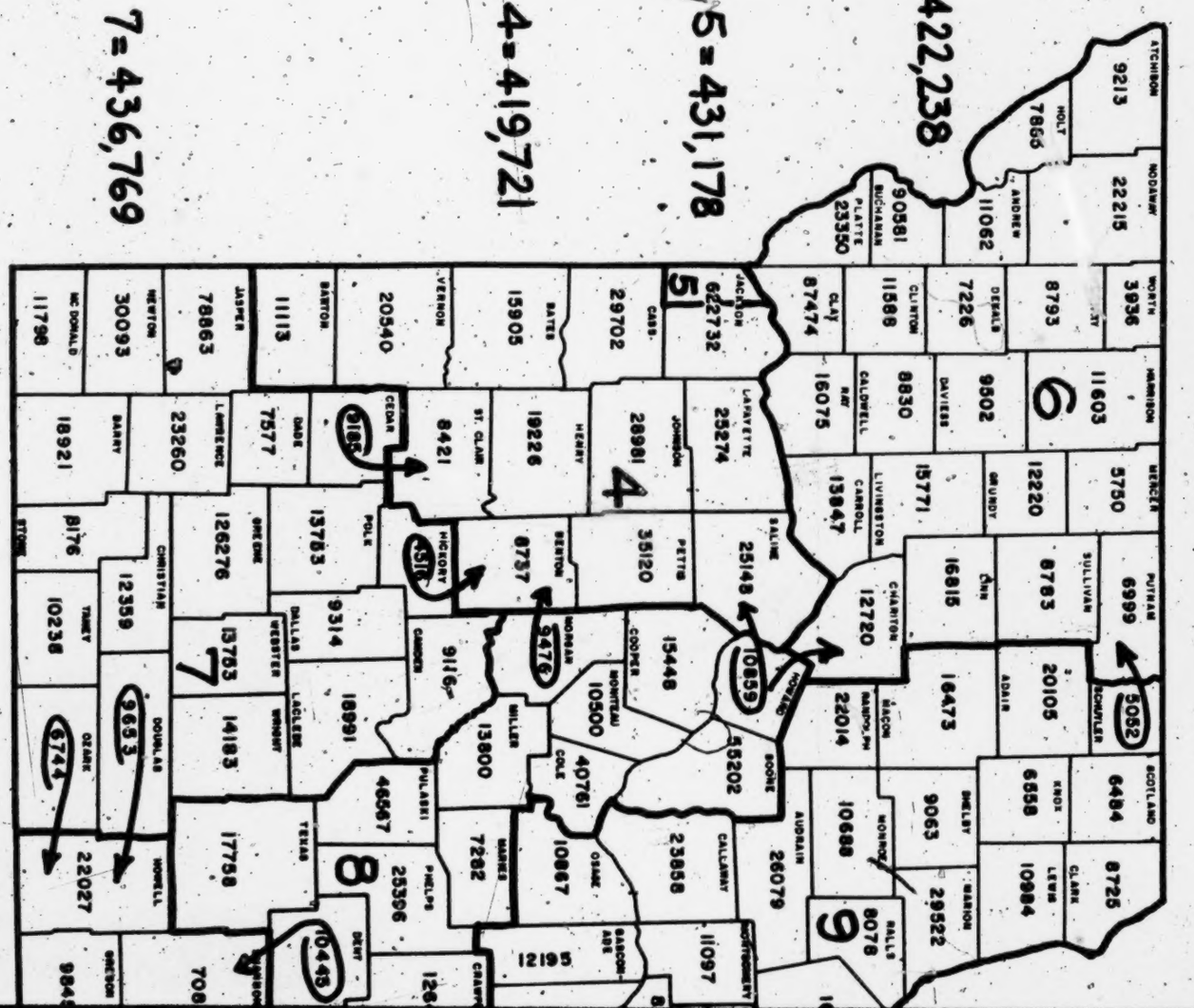
The districts created by the 1967 Act are NOT as nearly equal as is practicable, because simple transfers of even whole counties from the higher to the lower of adjacent districts could have been made which would have resulted in district populations significantly closer to equality.

An inspection of the table and map which follows will reveal how many of such transfers could easily be made; the table offers a choice of counties for transfer; other possible transfers are apparent.

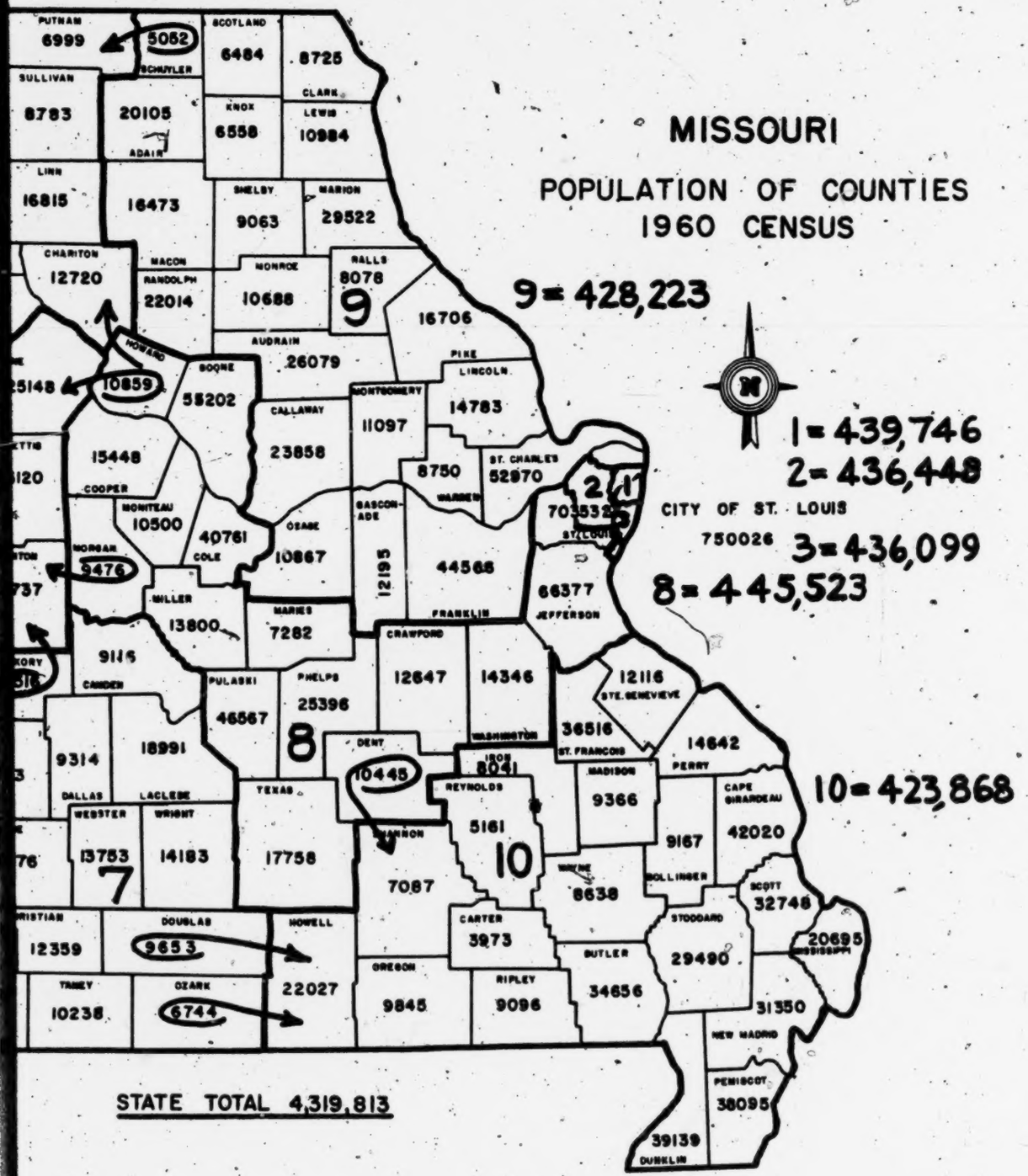
POPULATION DIFFERENCES BETWEEN DISTRICTS

Populations Under 1967 Act				Suggested	Populations After Suggested Transfer				
Higher District	Lower District	Difference	County Transfer					New Difference
(8th) 445,523	(10th) 423,868	+ 21,655	Dent	10,445	(8th)	435,078	(10th) 434,313	+ 765
(8th) 445,523	(4th) 419,721	+ 25,802	Howard	10,859	(8th)	434,664	(4th) 430,580	+ 4,084
(8th) 445,523	(4th) 419,721	+ 25,802	Morgan	9,476	(8th)	436,047	(4th) 429,197	+ 6,850
(8th) 445,523	(6th) 422,238	+ 23,285	Howard	10,859	(8th)	434,664	(6th) 433,097	+ 567
(7th) 436,769	(4th) 419,721	+ 17,048	Cedar	9,185	(7th)	427,584	(4th) 428,906	— 1,322
(7th) 436,769	(4th) 419,721	+ 17,048	Hickory	4,516	(7th)	432,253	(4th) 424,237	+ 8,016
(7th) 436,769	(10th) 423,868	+ 12,901	Douglas	9,653	(7th)	427,116	(10th) 433,521	— 6,405
(7th) 436,769	(10th) 423,868	+ 12,901	Ozark	6,744	(7th)	430,025	(10th) 430,612	— 587
(9th) 428,223	(6th) 422,238	+ 5,985	Schuyler ...	5,052	(9th)*	423,171	(6th) 427,290	— 4,119

* Adjust further by transferring excess present in the (1st) or (2nd) to the (9th).



STATE TOTAL 4,319,813



The Congressional Representative Districts of Missouri Created by the 1967 Redistricting Act.

The official district population data prepared by the Bureau of the Census (Item 13 of "Stipulation of Evidence") is as follows:

District	Population	District	Population
1	439,746	6	422,238
2	436,448	7	436,769
3	436,099	8	445,523
4	419,721	9	428,223
5	431,178	10	423,868

State total population: 4,319,813

District average population: 431,981

The City of St. Louis (a city not within a county) contains a part of District 1 and a part of District 3.

The County of St. Louis contains all of District 2 and a part of each of Districts 1, 3, 8, and 9.

Jackson County contains all of District 5 and a part of District 4.

Kansas City contains all of District 5 and a part of District 4. One ward of Kansas City which is in Clay County is in District 6.

Closer approach to equality of district populations can also be attained by utilizing smaller political subdivisions, such as townships of the counties, and also wards and precincts, particularly in the more populous areas.

The heavily populated First, Second, and Third districts, situated in the populous areas of St. Louis County and the City of St. Louis, could have been easily adjusted among themselves. The Ninth district which is in need of adjustment by addition of population, particularly after the suggested transfer of Schuyler County to the Sixth, could have attained this additional population from the First or Second, each of which has an excess of population.

The changes suggested indicate that the General Assembly did not create districts as nearly equal in population as it might have easily created by a few obvious shifts of existing political units between adjacent districts. Sufficiently close and easily attainable population equality of the districts has not been accomplished by the 1967 Act.

5.

"Legislative Interplay" Is NOT a Constitutionally Acceptable Basis for Variances From Equal Population Districts.

Appellants argue that allowance can be made for "legislative interplay", "political compromise" and "practical political problems" (App. Br. 38-44). Appellees urge the court to reject this argument, as did the trial court, which said (A. J. S. 7):

> "In other words defendants would have this court hold that their definition of 'practicable' is legally equivalent to 'acceptable to a majority of the legislature'. We reject that argument."

No good purpose, in judicial efforts to define constitutional standards for district line-drawing, would be served by adding to the redistricting lexicon phrases so subject to broad interpretations. The courts are already plagued with confusion over the use of the terms "political question" and "political thicket".

Certainly if Appellants are suggesting that partisan political considerations, or the interests of individual legislators in favorably structured districts, are acceptable reasons for unequal districts, this court should clearly state that such standards for variance are **not** constitutionally permissible.

Numerous federal decisions, including those of this Court, refer to the responsibility for congressional redistricting, as a function of the state legislatures. One sometimes sees the language employed that the job of redistricting is a political matter. Perhaps a closer examination of the terms is in order.

The power and authority to establish congressional districts within a state is derived from Article I of the Constitution. Section 2 provides "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States". Section 4 says "The Times, Places and Manner of holding elections for Senators and Representatives shall be prescribed in each state by The Legislature Thereof." In **Wesberry v. Sanders**, 376 U. S. 1, 6, 11 L. Ed. 2d 481, 486 (1964), this court made it clear however that

> "* * * nothing in the language of that Article gives support to a construction that would immunize state congressional apportionment law which debase a citizen's right to vote from the powers of courts to protect the constitutional rights of individuals from legislative destruction * * *"

The terms "political question" and "political thicket" have ceased to be a barrier to proper judicial action since **Baker v. Carr** yet the idea still seems to pervade some legislative halls that there is a range within which political considerations may be acceptable in causing variations from districts of equal population.

Probably some hundred or more federal decisions, a score or more of them by this Court, have made it clear that equal weighting of all persons' votes is the standard; however, the significance of **Baker** and its progeny seems not yet to have been fully accepted by the legislatures of the several states. So we see it necessary for the federal courts to repeatedly point out that legislatures are bound by certain constitutional limitations in the exercise of these duties. Why is it that in state after state the legislature cannot achieve a constitutionally acceptable plan until it has made the trip to the federal court at least once and frequently twice?

In truth the balancing of districts by population is not and never was a "political question". **Black's Law Dictionary**, Fourth Edition, defines "political questions" as:

> "Questions of which the courts of justice will refuse to take cognizance, or to decide, on account of their purely political character; or because their determination would involve an encroachment upon the executive or legislative powers; e. g., what sort of government exists, whether a foreign country has become an independent state, etc. Kenneth v. Chambers, 14 How. 38, 14 L. Ed. 316."

Certainly the language of Article I and of this Court makes it clear that in performing the function of congressional district line-drawing the legislature is acting as a surrogate for the people, in whom the constitutional power to elect congressmen ultimately rests.

What we are concerned with is the right of the individual voter. The confusion arises, it seems to Appellees, from thinking of the legislature's task as a prerogative or power rather than a legislative task, duty, and responsibility to the people.

The lower court found on the facts that the legislature failed in its duty to the people by permitting considerations of "political compromise" and "legislative interplay" to enter into its structuring of the district lines. The lower court specifically said (A. J. S. 7):

> "We find that defendants' evidence leads to the inevitable conclusion that a majority of the members of the Legislature were motivated by other considerations than the constitutional objective of 'practicable equality'."

As Judge Collinson stated (A. J. S. 98):

> "* * * on its face and under the undisputed evidence it is not an attempt to divide the State of Missouri in Congressional districts that are as nearly equal in population as is practicable."

The goal is mathematical equality. Perfection may not be obtainable by mortal man. But it should be sought. The obligation of the legislature is to make a good faith effort to meet the constitutional standard, unhampered by personal or partisan political considerations. The objective is not to meet a minimum standard but to come as close as possible to a solution which treats each voter on an equal basis. The federal courts will only cease to be flooded with reapportionment litigation when state legislatures cease to conceive of the task of redistricting as one which permits them to engage in political gamesmanship.

It is perhaps appropriate to point out that there are real differences between a state's role in structuring legislative districts for state representatives and state senators

as opposed to a state legislature's role in drawing congressional district lines.

In the first instance there is an area for political judgment. Should the body be elected at large or from districts? Should there be one or two houses of the legislature? How many members should there be in each house? Must legislators reside in a particular district? Should some legislators be elected at large and others from districts? Should at large legislators reside in specific districts? These are political questions which the people of a state may determine and later change, subject to federal constitutional limitations requiring equal protection of the laws.

On the other hand the state's role in congressional redistricting is much more restricted. The number of congressmen is set by federal law. Under present federal statute they may not be elected at large. The only specific power given the state legislatures is the right to determine "The time, place and manner of holding congressional elections" (Art. I, § 4).

The legislature in addition has the duty of redrawing the congressional district lines after each federal census. That duty is a largely mechanical one, arising solely from the necessity for change arising from changes in a state's relative population. Such changes do not present political questions and the duty is confined within a narrow scope by constitutional limitations. It is not intended to create opportunities for oppression of racial or political minorities by the majority, nor the opportunity for creating favorable districts to a party, class or interest.

The history of legislative line-drawing prior to **Baker** teaches that the will of the people is progressively subverted and deviations from equal representation become progressively worse, unless the legislatures are told in

clear language what their line-drawing duty is, and, what they may not do. When there is a "political thicket", it arises not because there is a "political question", but because the constitutional limitations and the democratic ideal of equality are ignored.

Appellants by their argument that political or legislative interplay is a constitutionally acceptable and rational basis for variance from a population formula *impliedly* and *perhaps expressly concede* that such interplay occurred in the Missouri legislature in the adoption of the 1967 Act. Some quotations from the transcript will make clear that the trial court's finding was based on substantial evidence and further explain appellants' arguing and attempting to establish "political expediency" as a constitutionally acceptable ground.

Appellees start with the premise which is not disputed by Appellants, namely, that numerous shifts of whole counties from one congressional district to another would have resulted in the 1967 Act achieving a much closer approximation of equality of population between districts.

What then was the evidence presented which intended to rationally excuse the adoption of a less adequate plan? The answer came quite clearly from the legislators who testified.

Mr. Richard J. Rabbitt, the majority floor leader, testified (A. R. 72):

> "We are dealing with men, and those men represent people at home, and I think they have to follow those people's wishes, so we had to try to adopt a plan that could get 82 votes in the House and 18 votes in the Senate."

and (A. R. 72-73):

> "• • • we tried to, if possible, stick to historical usage of these counties in districts • • •"

and (A. R. 76):

> "I think that it is a reasonable legislative compromise."

and (A. R. 77):

> "I will say this, that there probably were changes that could be made that would do what you are saying [i. e., reduce the variances], but I don't think a bill like that could have passed".

Senator William Baxter Waters, majority leader of the State Senate, similarly testified (A. R. 83):

> "Q. Now, Senator, you have testified that population was your prime consideration in considering this legislation, but you have also testified that you gave recognition to the necessity of enacting an act? A. Passing a bill, yes, sir."

He also admitted that the legislature took historical factors into account (A. R. 83-84).

State Senator Thomas G. Woolsey stated (A. R. 91-92) that his concern was with seeking to establish districts, where possible, which would be politically balanced and thought the bill as passed was unfavorable to his (the Republican) party. He recognized the bill as a political compromise (A. R. 93). Similar testimony was given by the House minority floor leader, R. J. King, Jr. (A. R. 95-97). He conceded that the legislature was working with erroneous population figures and they didn't have a good opportunity to look at the bill.

> "Q. * * * do you have an opinion as to whether or not the 1967 Congressional Redistricting Act is a reasonable and fair compromise? A. I believe, in retrospect, that it is a fair compromise. I would say that most of our opposition to the House Substitute [the Act] came from, one, the fact that we did not

have a real good opportunity to see this bill, this substitute, we really didn't know what it did, and I think this is evidenced by the fact that the errors in the population showed up. * * *"

State Senator Omer H. Avery, chairman of the Reapportionment Committee, testified (A. R. 116):

"* * * It was also the desire of the committee that the districts, the ten districts, be changed only as much as would be necessary to make them come within the population limitations and not try to make any political complexion changed [sic] designedly as to any particular district."

Senator Avery's testimony made it clear that his committee took a 2% variation as an acceptable variance within which to make political accommodations (A. R. 116-120).

The trial court has fully discussed the other unacceptable considerations: (1) the use by the legislature of inaccurate figures not based on the 1960 census; (2) that the legislature's district figures were in error and the use of the correct figures produced greater variations than those contemplated by that body in adopting the 1967 Act; (A. R. 99), and (3) the ease with which shifts of whole counties and convenient political subdivisions could have produced more equal districts.

The foregoing illustrates some of the so-called legislative interplay. The attempt was to barely come under the wire of possible constitutional acceptance and not a good faith effort to achieve the best possible plan from a population standpoint. Certainly there was substantial evidence to support the trial court's findings.

6.

Compactness Is NOT a Defense to Unbalanced Districts.

Appellants argue that by shifting counties to achieve closer balancing of district populations, the districts might become less compact. Appellees find it strange to justify malapportionment by claiming to seek compactness. The "compact and contiguous" concept of the ideal district is a doctrine seeking to avoid gerrymandering. Gerrymandering itself is but a device by which improper political objectives (districts unjustifiably favorable to a candidate, party or interest) are sought, without violating the doctrine of equality of population.

If geographic compactness was a concern of the General Assembly, this objective certainly was not attained in the Act; the sprawling irregular shape of the Eighth District, in two instances only one county wide, wandering irregularly across nearly two-thirds of the width of the entire state does not comply with any definition of "compact".

The changes suggested by Appellees, of transferring several counties from a district of higher population to an adjacent district with lower population (discussed pages 13-16 this brief), do not make the Eighth District any less compact nor affect significantly the compactness of any other districts.

7.

Percentage or Numeric Comparisons With Other Decisions Are of No Significance in Testing Good Faith Efforts or Compliance With Acceptable Standards.

Appellants, and particularly Appellants Heinkel, et al., seek to justify the 1967 Act by comparison with the mathematics of other decisions and particularly, **Gong v. Kirk**, 278 F. Supp. 133; affirmed, sub nom. **Kirk v. Gong**,

389 U. S. 574, 88 S. Ct. 695, 19 L. ed. 2d 784, and **Connor v. Johnson**, 279 F. Supp. 619, affirmed per curiam, 386 U. S. 483.

In **Swann v. Adams, III**, 385 U. S. 440, 445, 87 S. Ct. 659, 17 L. Ed. 2d 501 (1967) this Court stated that the approval of a variance in one state has little bearing on a similar variance in another state. Logically each case must be considered on the basis of its particular facts. See also **Reynolds v. Sims**, 377 U. S. 533, 578:

> "What is marginally permissible in one state may be unsatisfactory in another depending on the particular circumstances of the case."

Looking beyond the rule of **Swann v. Adams, III**, there are further reasons for discarding **Gong v. Kirk**, supra, and **Connor v. Johnson**, supra, as comparable precedents. First of all in each case the lower court itself either made the districts **(Gong)** or upheld a redistricting act **(Connor)** and each was affirmed by this Court on appeal. Consequently the heavy burden of overcoming the weight of the trial court's findings was not placed upon this Court, whereas in the instant case this Court must find that there is no substantial evidence to support the trial court's fact findings to justify a reversal. Secondly, the records and decisions in both **Gong** and **Connor** do not disclose that there was evidence in either case to indicate that the respective court or the legislature based their actions on constitutionally unacceptable grounds.

The trial court has fully covered the untenable reliance of Appellants on **Connor v. Johnson** (A. J. S. 65-68). The issue presented to this Court in said case was solely the question of racial discrimination under the Fourteenth and Fifteenth Amendments. No issue was framed or presented based on Article I.

In **Gong v. Kirk**, 278 F. Supp. 133, 135 (1967), the three-judge court itself redistricted the state of Florida,

resulting in districts varying 8,027 from the largest to the smallest. Populations of voting precincts were calculated by the court from registration figures as stated by the court:

> "Since federal census figures are not available by presently established precincts, a calculation of the population of each relevant voting precinct was made by determining the ratio, based on the most recent voter registration figures, of the registered voters in each voting precinct to the total of the registered voters of the particular county and applying that ratio to the county population as shown by the 1960 decennial census, i. e. county registration is to county population as precinct registration is to precinct population. **This formula was suggested by both plaintiffs and defendants**[6]" (Emphasis supplied).

Defendants, upon receiving an official Census Bureau calculation of the populations of the districts which differed by 48,824, moved for reconsideration of the judgment and final order, which was denied. Since **all parties** to the suit **had agreed** upon the **use of registration figures as a basis** of calculation of the populations, the official census figures came too late for consideration. This Court subsequently affirmed, in sub nom. **Kirk v. Gong**, 389 U. S. 574 (1968).

Appellants throughout their discussions attempt to create an impression that the differences are much less by calculating or quoting differences in percentages or ratios. The apparent differences are thus reduced by a hundredfold when percentage is stated and are apparently reduced further by quoting the percentage as plus or minus from the average. Quoting the district difference as a ratio or fraction of the average creates a similar false impression. **Population is the true measure of district size**, not percentages or ratios; **people vote**, not percentages.

Appellants' extensive table (App. Br. 29-34) purports to show the population of the highest and lowest district of a state and the maximum difference. Only states are shown where litigation resulted from the dissatisfaction of some citizen voters with the districting acts. Appellees do not vouch for the accuracy of this table but cite it for the sake of argument only.

Appellants state their purpose in submitting the table is as follows (App. Br. 34):

> "* * * It has been appellants' purpose to demonstrate the constitutional validity of the Missouri Act by citation of cases before this court as well as cases before lower courts. Appellants recognize that what is constitutionally permissible in congressional districts in one state is not conclusive upon the constitutional validity of a congressional plan in another state. However, where a pattern has been established by learned members of lower courts throughout the country and where a pattern is developing among the cases which have been summarily affirmed by this court, comparisons become persuasive."

This Court, in **Reynolds v. Sims**, 377 U. S. 533, 577 (1964), established the following principle, which the Court has repeatedly reaffirmed, the latest time being in **Swann v. Adams, III**, 385 U. S. 440, 445, 87 S. Ct. 569, 572, 17 L. ed. 2d 501 (1968).

> "What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case."

This Court in these cases was discussing districting or apportioning of state legislative districts but the same principle applies to congressional representative districting, with the added requirement of a closer approach to population equality for congressional representative districts, concerning which this Court said, **Reynolds v. Sims**, at page 577:

"Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting."

A careful survey and analysis of the data of the above cited table (App. Br. 29-34) does not show that the predominating number of cases decided in the several states significantly favor districting which had greater maximum differences than the Missouri Act. The total number of states listed is 26. Of these there are eleven (11) states having higher population differences than Missouri (Ala., Ariz., Calif., Ga., Ill., Ky., N. H., N. Y., Tex., Va., and Wash.) and nine (9) states have lower differences (Ark., Ind., Md., Mass., Mich., Mont., N. C., Ohio, and Tenn.) and two (2) states (Fla., and Kans.) have lower differences but these used other than federal population data for their calculations and have higher differences only when federal data is estimated and compared. Mississippi has nearly the same difference (26,265 Miss. and 25,802 Mo.) but the emphasis placed by the plaintiffs therein was upon alleged racial discrimination in the making of the districts and the appeal to this Court was **solely** on that question.

Thus an examination of the cases listed is not as persuasive as Appellants would like to have this Court believe. Furthermore, why the litigants in the respective cases did not pursue their litigation to higher courts cannot be ascertained; many were undoubtedly personally satisfied with the districts which had been made by the legislature upon order of the court or made by the court itself, although further litigation, had it been pursued, might have resulted in the districting act's invalidation.

The latest judicial determination of a districting act is only persuasive if that determination is made by this Court, because the litigation is begun and pursued and discontinued for so many reasons irrelevant to the issues

involved therein. Even if determined by this Court, the decision may probably be only persuasive and not conclusive, because the conditions encountered in each state are so different.

CONCLUSION.

The court below in its opinion, decision, and judgment properly found that the 1967 Missouri Congressional Redistricting Act does not comply with Article I, Section 2 of the Constitution of the United States and is unconstitutional and void.

Population differences between the districts created by the Act are gross and excessive (NOT "de minimis" or "minor" as Appellants contend) and violate the judicially established requirement and principle "that as nearly as practicable one man's vote in a congressional election is to be worth as much as another's".

Unwarranted and unjustified population differences between adjacent districts, which differences can readily and easily be significantly diminished by the transfer of whole counties or other political subdivisions from one district to an adjacent district, conclusively prove that the districts have not been created as required by the aforesaid Article I, Section 2.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

JAMES C. KIRKPATRICK, Secretary of State of Missouri, and NORMAN H. ANDERSON, Attorney General of Missouri,

Appellants,

and

F. V. HEINKEL, R. J. ROSIER, W. W. BECKETT, A. D. SAPPINGTON, L. O. WALLIS, MILLER HERN, HERMAN HETLAGE, HERMAN KERTZ, TURPIN YOUTSEY and GLEN MYERS,

Intervenor-Appellants,

vs.

PAUL W. PREISLER, LOUISE ERBE, BOSTIC J. FRANKLIN, LUCILE RIEDEL, DOROTHY CHILDS, SARAH RIFKIN, and MARTHA LEONARD,

Appellees.

On Appeal from the United States District Court For the Western District of Missouri Central Division.

APPELLANTS' REPLY BRIEF.

PRELIMINARY STATEMENT.

Appellees' Brief on the Merits does not attempt to reply in detail to the factual matters set forth in Appellants' brief nor to the propositions of law advanced in detail in Appellants' brief. Appellees chose to treat most of Appellant's brief in regard to facts and in regard to law with superficial

conclusions which negative the arguments advanced by Appellants rather than with reasoned arguments to overcome the arguments advanced by Appellants.

However, in Appellants' judgment some reply to Appellees' arguments may be helpful to the court.

ARGUMENT.

I.

The constitutionality of the 1967 Missouri Congressional Redistricting Act is fully supported by "rational grounds."

Appellees have advanced the argument on pages 7 through 9 of their brief that the burden of proof is on Appellants to support the validity of the Congressional Redistricting Act under review on "rational grounds." This theme is repeated continuously throughout Appellees' brief under most of the other arguments advanced by them. Although many rational considerations of the Missouri Legislature which played some role in the legislative process in the enactment of the law under review are discussed in detail in Appellants' brief, Appellees have not responded in their brief to most of these discussions.

Appellees cite the raw census statistics of 1960 which show a population difference between the largest district (the 8th) and the smallest district (the 4th) of more than 25,000 people and leap to the conclusion that this difference in population proves that a citizen in the 8th district does not have a vote in congressional elections equal to the vote of a citizen in the 4th district. This simplistic approach, based upon seven year old raw population statistics, is totally arbitrary and reflects a complete blindness to reality. Justice Fortas has reflected in his dissenting opinion in **Avery v. Midland County, Texas**, 390 U.S. 474, 88 S.Ct. 1114, l.c. 1132, 20 L.Ed.2d 45, l.c. 66 (1968) "Substance not shibboleth should govern in this admittedly complex and subtle area; * * *." Let us again examine the substance.

A.

Raw population differences between the largest district (8th) and the smallest district (4th) are justified by other considerations and do not result in voter inequality between the two districts.

Appellants' brief has discussed in detail the evidence in the record which shows conclusively that the excessive raw population in the largest district does not result in a debasement of the right to vote in that district. Large numbers of transitory nonresident, nonvoting population are included in the raw census statistics for that district. The effect of such transitory population at Ft. Leonard Wood, a huge military reservation in Pulaski County, is reflected by the table on page 36 of Appellant's brief which shows the relationship of total vote to population in the presidential election of 1964 in Pulaski County and in every county surrounding Pulaski County. The percentage ratio of total votes to population in Pulaski County was 11.2%. The ratio of total votes to population in Phelps County, which includes a branch of the University of Missouri and some of the overflow transitory population from Fort Leonard Wood, was 37.5%. However, the ratio of total votes to population in the remaining counties ranged from 44% to 56.2%.

A single presidential election is arguably not an accurate index of the voting strength of Pulaski County. However, the fact is fully borne out by the following table showing the percentage of total vote to population for these same counties in all general congressional elections from 1960 through 1966.

TOTAL VOTE CAST IN CONGRESSIONAL GENERAL ELECTIONS. SELECTED MISSOURI COUNTIES

1960-1966

Year	County	Population	Vote	Percentage
1966	Pulaski	46,567	2769	5.96
	Phelps	25,396	5990	23.58
	Laclede	18,991	5486	28.88
	Texas	17,758	3675	20.68
	Miller	13,800	4328	31.36
	Camden	9,116	4059	44.41
	Maries	7,282	2104	28.89

Year	County	Population	Vote	Percentage
1964	Pulaski	46,567	5120	10.99
	Phelps	25,396	9260	36.46
	Laclede	18,991	8021	42.23
	Texas	17,758	7690	43.30
	Miller	13,800	6531	47.32
	Camden	9,116	4886	53.59
	Maries	7,282	3144	43.17
1962	Pulaski	46,567	3609	7.75
	Phelps	25,396	5821	22.92
	Laclede	18,991	6369	33.53
	Texas	17,758	5846	32.92
	Miller	13,800	4814	34.88
	Camden	9,116	4059	44.41
	Maries	7,282	2388	32.79
1960	Pulaski	10,392	6131	58.99
	Phelps	21,504	9964	46.33
	Laclede	19,010	8728	45.91
	Texas	18,992	8938	47.06
	Miller	13,734	6972	50.76
	Camden	7,861	5157	65.60
	Maries	7,423	3303	44.49

Source—P. 1144, Official Manual, State of Missouri, 1967-1968
P. 1275, Official Manual, State of Missouri 1965-1966
P. 1233, Official Manual, State of Missouri, 1963-1964
P. 1145, Official Manual, State of Missouri, 1961-1962
Pp. 27-13, 14, U.S. Census Population; 1960, No. of Inhabs., Mo.
Final Report PC (1-27A)

It is noted that in 1960 58.99% of the Pulaski County population voted in the congressional election. The percentage plunged to 7.75% in 1962, 10.99% in 1964 and 5.96% in 1966. This radical reduction in percentage of total vote to population is accounted for because the military population at Ft. Leonard Wood was not counted in Pulaski County for the 1950 census, which are the population figures reflected on the 1960 Election portion of the above table.

Retired Justice Tom C. Clark in his introduction to a symposium entitled One-Man-One-Vote and Local Government, **George Washington Law Review**, May 1968, Volume 36, No. 4, commented upon the fallibility of raw census statistics in measuring the debasement of voting rights in a district such as the 8th district of Missouri as follows:

> "The one man, one vote rule will never become reality. As Professor Banzhaf points out, our census is not based

on eligible voters but on living persons. It includes people who never register to vote—children, aliens, transient students at a large university, military personnel who by happenstance are in an area at census time, insane people, felons both in and out of prison and others who for various local rules are not entitled to vote. Still by inclusion in the census they might well give a district a higher percentage of representation. * * *"

The invalidity of raw census statistics as a sole standard for measuring voter equality is further demonstrated by the voting experience in the 1968 congressional elections. Appellants have tabulated below the Missouri congressional districts by population from the largest district to the smallest and have reflected the total vote cast for congressional candidates in each district. The voting statistics are from unofficial returns reported in the New York Times, Sunday, November 10, 1968, Section L. Page 76.

COMPARISON OF 1968 TOTAL CONGRESSIONAL VOTE TO DISTRICT POPULATION (1960 FEDERAL CENSUS)

Rank	Pop.	Dist.	Vote	Rank
		MISSOURI		
(1)	445,523	8th	156,490	(4)
(2)	439,746	1st	120,183	(10)
(3)	436,769	7th	173,038	(3)
(4)	436,448	2nd	206,307	(1)
(5)	436,099	3rd	139,548	(7)
(6)	431,178	5th	126,885	(8)
(7)	428,223	9th	192,594	(2)
(8)	423,768	10th	124,692	(9)
(9)	422,238	6th	144,689	(5)
(10)	419,721	4th	141,621	(6)

The 8th congressional district, although first in 1960 raw population, was fourth in total vote in a hotly contested congressional race. The 4th congressional district, although tenth in 1960 raw population was sixth in total vote in a contest in which the Democratic incumbent had token opposition. The 6th district, although ninth in 1960 raw popula-

tion, was fifth in total vote in a lively contest. The 1st district, although second in 1960 raw population, was tenth in total vote in a hotly contested race to elect Missouri's first Negro congressman. The low ratio of vote to 1960 raw population in the 1st district also reflects the declining population experienced nationally in such innercity districts. The 2nd district, although fourth in 1960 raw population, was first in total vote in a hotly contested race in which a Democrat captured a traditionally safe Republican seat. The 9th district, although seventh in 1960 raw population, was second in total vote in a hotly contested race. Appellees have urged that the 9th district should be increased in raw population (P. 16, Appellee's brief). It is Appellants' judgment that the recent election experience strongly suggests tremendous population growth in the 9th district since 1960, thus, if anything, warranting a smaller raw population.

The fallibility of raw population figures as an absolute standard to measure voting inequities in congressional districts is demonstrated on a national basis by the experience of the several states in the recent election. Appellants have tabulated the voting experience in the 1968 general congressional elections with relation to 1960 raw population statistics for these districts. States selected in the following table are from all sections of the country.

B.

COMPARISON OF 1968 TOTAL CONGRESSIONAL VOTE TO DISTRICT POPULATION (1960 FEDERAL CENSUS)

Rank	Pop.	Dist.	Vote	Rank
		ALABAMA		
(1)	438,130	6th	84,867	(6)
(2)	435,745	5th	79,561	(8)
(3)	414,392	1st	92,166	(2)
(4)	417,052	7th	88,574	(3)
(5)	407,939	4th	84,334	(7)
(6)	396,075	2nd	109,251	(1)
(7)	383,782	3rd	86,080	(4)
(8)	383,625	8th	85,812	(5)

Rank	Pop.	Dist.	Vote	Rank
		FLORIDA		
(1)	448,885	11th	125,512	(9)
(2)	418,595	3rd	124,807	(10)
(3)	416,579	6th	128,546	(8)
(4)	415,496	1st	131,511	(7)
(5)	413,597	7th	186,470	(1)
(6)	411,550	8th	unop.	
(7)	407,677	2nd	unop.	
(8)	406,367	4th	169,628	(5)
(9)	405,969	5th	176,969	(3)
(10)	405,633	10th	175,282	(4)
(11)	401,251	9th	185,128	(2)
(12)	400,061	12th	135,320	(6)
		INDIANA		
(1)	428,197	6th	161,895	(9)
(2)	428,100	11th	145,173	(11)
(3)	427,267	1st	157,747	(10)
(4)	426,620	7th	181,650	(7)
(5)	425,360	9th	189,562	(5)
(6)	424,760	8th	205,533	(2)
(7)	423,824	4th	192,460	(3)
(8)	423,227	2nd	189,834	(4)
(9)	419,765	5th	274,910	(1)
(10)	418,226	3rd	177,445	(8)
(11)	417,156	10th	183,074	(6)
		KANSAS		
(1)	459,063	4th	151,670	(4)
(2)	450,661	2nd	160,282	(2)
(3)	439,686	5th	157,868	(3)
(4)	435,145	1st	162,718	(1)
(5)	394,056	3rd	118,204	(5)
		CALIFORNIA		
(1)	446,974	2nd	206,866	(9)
(2)	434,447	38th	189,221	(15)
(3)	434,364	36th	206,350	(11)
(4)	433,812	35th	286,462	(1)
(5)	433,295	5th	115,770	(36)
(6)	432,438	16th	152,665	(27)
(7)	432,114	25th	206,332	(12)
(8)	431,237	15th	159,446	(24)
(9)	429,933	27th	219,117	(5)
(10)	428,808	11th	206,461	(10)
(11)	428,545	6th	192,504	(14)
(12)	426,242	22nd	176,765	(21)
(13)	423,706	18th	151,282	(28)
(14)	421,032	28th	231,622	(3)
(15)	416,461	26th	195,840	(13)
(16)	415,898	33rd	183,045	(19)
(17)	414,736	3rd	186,411	(17)
(18)	413,568	12th	148,306	(31)
(19)	412,283	1st	170,083	(22)
(20)	411,201	20th	189,156	(16)
(21)	409,469	24th	206,903	(7)
(22)	409,030	14th	209,096	(6)
(23)	406,743	31st	157,098	(25)
(24)	406,332	37th	147,803	(32)
(25)	404,474	19th	149,141	(30)
(26)	403,953	29th	143,020	(35)

Rank	Pop.	Dist.	Vote	Rank
(27)	402,717	34th	208,206	(6)
(28)	401,148	21st	95,200	(38)
(29)	399,473	30th	111,693	(37)
(30)	398,711	4th	154,009	(26)
(31)	397,745	9th	178,412	(20)
(32)	395,452	7th	150,241	(29)
(33)	395,241	10th	233,734	(2)
(34)	394,860	32nd	183,802	(18)
(35)	393,621	17th	146,244	(34)
(36)	393,199	13th	225,285	(4)
(37)	392,973	8th	162,815	(23)
(38)	392,756	23rd	147,234	(33)
		COLORADO		
(1)	493,887	1st	199,363	(2)
(2)	438,974	2nd	244,697	(1)
(3)	415,187	3rd	169,764	(3)
(4)	405,899	4th	169,184	(4)
		ILLINOIS		
(1)	451,527	8th	156,910	(17)
(2)	451,042	9th	132,705	(22)
(3)	450,884	11th	215,765	(4)
(4)	441,332	22nd	169,119	(14)
(5)	439,182	14th	229,613	(2)
(6)	433,935	10th	216,673	(3)
(7)	429,267	3rd	174,942	(12)
(8)	428,519	17th	183,598	(10)
(9)	425,454	2nd	154,271	(18)
(10)	420,109	6th	103,630	(23)
(11)	417,760	21st	203,272	(5)
(12)	416,712	7th	96,008	(24)
(13)	415,838	4th	194,477	(7)
(14)	415,110	24th	158,625	(16)
(15)	412,709	23rd	188,747	(8)
(16)	410,650	15th	194,845	(6)
(17)	410,402	19th	180,805	(11)
(18)	409,195	1st	137,417	(21)
(19)	407,052	13th	250,156	(1)
(20)	401,919	20th	187,201	(9)
(21)	401,862	5th	150,533	(19)
(22)	401,503	18th	174,608	(13)
(23)	394,914	12th	158,885	(15)
(24)	394,481	16th	137,749	(20)
		NORTH CAROLINA		
(1)	423,750	7th	unop.	
(2)	421,735	6th	141,711	(6)
(3)	420,074	11th	146,233	(4)
(4)	415,365	2nd	unop.	
(5)	413,729	10th	158,608	(2)
(6)	413,668	3rd	106,609	(8)
(7)	412,765	1st	113,888	(7)
(8)	412,329	4th	151,735	(3)
(9)	408,720	9th	unop.	
(10)	407,546	8th	143,866	(5)
(11)	406,474	5th	164,341	(1)
		OKLAHOMA		
(1)	396,161	3rd	123,716	(5)
(2)	392,905	4th	124,418	(4)

Rank	Pop.	Dist.	Vote	Rank
(3)	389,106	5th	122,534	(6)
(4)	386,133	1st	155,933	(1)
(5)	382,145	2nd	139,419	(3)
(6)	380,734	6th	143,647	(2)
		NEW JERSEY		
(1)	432,174	4th	187,208	(9)
(2)	424,175	10th	136,777	(12)
(3)	418,260	1st	203,061	(2)
(4)	416,115	4th	206,739	(1)
(5)	415,158	11th	136,033	(13)
(6)	412,139	12th	192,605	(5)
(7)	411,084	15th	190,966	(8)
(8)	406,818	8th	163,065	(10)
(9)	405,533	5th	201,935	(3)
(10)	396,396	14th	134,732	(14)
(11)	390,134	9th	194,012	(4)
(12)	390,121	7th	191,646	(7)
(13)	389,066	13th	122,833	(15)
(14)	382,413	3rd	191,760	(6)
(15)	374,996	2nd	156,760	(11)
		TENNESSEE		
(1)	404,968	2nd	102,403	(7)
(2)	401,152	3rd	125,250	(1)
(3)	400,916	7th	113,037	(4)
(4)	399,743	5th	103,595	(6)
(5)	395,918	1st	116,539	(3)
(6)	395,594	4th	100,376	(8)
(7)	390,336	8th	unop.	
(8)	389,722	9th	116,561	(2)
(9)	388,240	6th	104,548	(5)
		MARYLAND		
(1)	393,210	2nd	142,866	(3)
(2)	389,967	5th	165,121	(2)
(3)	388,294	8th	171,087	(1)
(4)	387,526	1st	113,553	(5)
(5)	386,991	6th	132,068	(4)
(6)	386,267	7th	101,159	(6)
(7)	385,197	3rd	76,497	(8)
(8)	383,237	4th	90,055	(7)
		NEW YORK		
(1)	435,684	40th	160,373	(16)
(2)	435,390	41st	123,104	(29)
(3)	435,393	39th	242,508	(1)
(4)	434,770	9th	140,638	(24)
(5)	434,750	7th	134,985	(26)
(6)	434,615	6th	164,148	(15)
(7)	434,552	8th	173,029	(12)
(8)	425,905	31st	144,949	(21)
(9)	425,822	29th	204,243	(3)
(10)	423,028	34th	182,018	(9)
(11)	420,467	26th	186,336	(8)
(12)	420,146	25th	189,404	(6)
(13)	417,478	16th	138,831	(25)
(14)	417,298	12th	52,933	(39)
(15)	417,122	10th	150,727	(19)
(16)	417,093	15th	120,111	(30)
(17)	417,090	11th	55,788	(38)

Rank	Pop.	Dist.	Vote	Rank
(18)	417,080	14th	65,985	(41)
(19)	417,040	13th	157,804	(17)
(20)	415,333	33rd	82,670	(33)
(21)	415,030	30th	180,864	(10)
(22)	410,943	36th	196,949	(4)
(23)	410,432	37th	177,858	(11)
(24)	409,349	27th	80,040	(35)
(25)	396,122	28th	80,536	(34)
(26)	393,585	1st	215,498	(2)
(27)	393,465	2nd	130,367	(27)
(28)	393,434	3rd	188,512	(7)
(29)	393,183	4th	165,809	(13)
(30)	393,288	5th	195,313	(5)
(31)	390,861	18th	45,879	(40)
(32)	390,742	17th	164,463	(14)
(33)	390,552	21st	65,928	(36)
(34)	390,492	22nd	59,603	(37)
(35)	390,363	20th	83,698	(32)
(36)	390,228	23rd	130,226	(28)
(37)	390,057	24th	149,993	(20)
(38)	390,023	19th	113,340	(31)
(39)	386,148	35th	155,089	(18)
(40)	385,406	32nd	144,334	(22)
(41)	382,277	38th	140,782	(23)
		TEXAS		
(1)	450,353	6th	unop.	
(2)	449,590	14th	unop.	
(3)	446,844	20th	77,215	(11)
(4)	445,815	21st	147,223	(2)
(5)	443,776	23rd	unop.	
(6)	438,578	12th	unop.	
(7)	422,063	17th	unop.	
(8)	418,183	15th	unop.	
(9)	417,396	22nd	157,163	(1)
(10)	417,283	7th	unop.	
(11)	416,083	10th	124,306	(6)
(12)	415,882	18th	119,453	(7)
(13)	414,160	3rd	136,937	(4)
(14)	412,192	5th	129,138	(5)
(15)	410,498	4th	unop.	
(16)	408,479	8th	88,689	(9)
(17)	398,127	1st	unop.	
(18)	396,402	9th	117,091	(8)
(19)	394,679	16th	84,258	(10)
(20)	394,457	13th	142,665	(3)
(21)	391,589	19th	unop.	
(22)	389,954	11th	75,339	(12)
(23)	387,794	2nd	unop.	
		WISCONSIN		
(1)	408,667	1st	172,159	(3)
(2)	400,567	8th	160,567	(4)
(3)	399,528	5th	111,511	(10)
(4)	397,918	2nd	179,800	(2)
(5)	397,429	9th	200,051	(1)
(6)	397,333	4th	158,960	(5)
(7)	391,743	6th	150,716	(8)
(8)	389,675	10th	158,054	(6)
(9)	387,077	7th	156,669	(7)
(10)	382,818	3rd	150,664	(9)

II.

Appellees have erroneously rejected the legitimacy of the legislative function in establishing congressional districts. (Pages 16-23, Appellee's Brief).

Appellees argue in their brief that a court may not take into consideration whether or not a particular congressional redistricting law is the result of a reasonable legislative compromise in determining the constitutional validity of population variations. It is difficult to perceive the precise point which Appellees attempt to advance in this argument. Appellees seem to argue that establishing congressional districts is not a legislative function. In this regard Appellees allude to the judicial term "political question" and seem to conclude that establishing congressional districts is really a ministerial function for the legislature which must be supported by all of the evidentiary requirements essential to a valid judicial decree. Thus, after relegating to judicial contempt such terms as "political question," "political thicket," "partisan political considerations," "individual legislator interests in favorable districts," "political matter," and "political considerations," Appellees conclude "* * * that in performing the function of congressional district line-drawing the legislature is acting as a surrogate for the people, * * *" (Appellees' brief, page 18). In furtherance of this reasoning Appellees further conclude "* * * That duty is a largely mechanical one, * * *. Such changes do not present political questions * * *." (Appellees' brief, page 20).

The alarm expressed by Judge Matthes in his dissenting opinion is certainly borne out by the foregoing argument of Appellees. The dissenting Judge concluded from the majority opinion "* * * that only the courts can ultimately assume and properly complete the task of Congressional redistricting * * *." (Preisler v. Secretary of State of

Missouri, 279 F.Supp. 952, l.c. 1005, P. 83, Appendices to Juris. Stat.).

Appellants are baffled and alarmed at this display of contempt and animosity toward legislative functions and political processes. Are Appellees in reality advocating a return to the system of rule by judges adhered to for a time by the Israelites in their history? Although this system may have provided effective government for the Israelites during a period of their history several thousand years ago, the concept is certainly alien to the Democratic traditions of this country.

Appellants view the legislative process and the political process with the same reverence and respect in which they hold the judicial process. Aristotle commented that man is a political animal. Appellants recognize this Aristotelian verity and are cognizant of their nature as man. However, Appellants do not claim any unique wisdom in conceiving congressional redistricting as a legislative function in the political process. This concept is supported by eminent authorities from many of the several states, to which we have extensively referred, in our principal brief (Pages 38-44). On the other hand, Appellees have failed to support with a single judicial authority their concept of this task of congressional redistricting as a mechanical or judicial function which the legislature happens to be performing.

Appellants vigorously oppose Appellees' contention that the function of congressional redistricting is the simple mechanical application of arbitrary lines to raw population statistics. There are an infinite variety of lines which can be applied to raw population statistics and the process can be continued into infinity without reaching mechanical perfection of raw population numbers in the districts. Appellants perceive the function as being a legislative deliberation in the political process through which expression is giv-

en to the multitude of legitimate competing interests of the community. The process is subjective and rational as opposed to objective and arbitrary. The end result will always be a compromise and the reasonableness of the compromise is tested by the equality in voting rights inherent therein.

III.

Appellees erroneously conclude that more substantial voter equality would result by the transfer of counties between adjacent districts (pages 13 through 16, Appellees' brief).

Appellees argue that greater equality of populations among the districts could have been achieved by the legislature in transferring whole counties between adjacent districts. Once again it must be emphasized that Appellees have totally misconceived the goal in apportionment cases. The goal is voter equality, not population equality, and Appellants firmly believe that raw census statistics are not the end-all in measuring voter equality.

Even under their own ground rules, Appellees have failed to propose a single comprehensive congressional redistricting plan resulting in closer population equality among the districts than in the 1967 Missouri Congressional Redistricting Act. Appellees' table and map on pages 14 and 15 of their brief is an unfinished game of congressional redistricting checkers. Various proposals are suggested which indicate a closer approximation in population of the two districts with which Appellees would tamper. Appellees imply that since two adjacent districts can be improved, a complete new improved plan is readily accessible. However, no single such plan is proposed.

The three St. Louis districts (1st, 2nd, & 3rd), are illustrative of this half-way approach taken by Appellees.

These three districts have a total "excess" population of 16,350, but Appellees give only cursory attention to the problem of distributing this population elsewhere. Appellee's partial solution is to remove Schuyler County (population 5,052) from the 9th to the 6th district, and then add the bulk of this "excess" population to the 9th district. They ignore the remainder of the "excess". (Page 16, Appellee's brief). This treatment, of course, flies in the face of what Appellant's believe to be blinding reality, which is that the 9th district has grown disproportionately in population since the 1960 census and was correctly "underpopulated" by the legislature (See table, supra pages 4-5).

> "• • • Implicit in this principle is the further proposition that the body creating an apportionment plan in compliance with a judicial order should ordinarily be left free to devise proposals for apportionment on an overall basis. • • •" **Burns v. Richardson**, 384 U.S. 73, 83, 16 L.Ed.2d 376, 386, 86 S.Ct. 1286 (1966).

The fact remains that neither Appellees nor the lower court have devised a comprehensive congressional redistricting scheme which would result in ten congressional districts which are more equal in raw population than the districts created by the 1967 act. This is fully discussed by Appellants in their brief (pages 62-65 Appellants' Brief on the Merits), and Appellees have not attempted to answer these discussions.

Appellants reiterate that raw census statistics standing alone are not a valid measure to determine voter equality. It must be remembered that the population of the largest district of the 1967 Missouri law exceeds the population of an average ideal district by 3.13%, and the population of the smallest district is 2.83% less than an average district. In viewing the reasonableness of these percentage variations

in congressional districts based upon raw census data, cognizance must be taken of errors in the census data. This inherent error is recognized by the census bureau as follows, **U. S. Bureau of the Census. U. S. Census of Population: 1960, Vol. I, Characteristics of the Population. Part A. Number of Inhabitants. U. S. Government Printing Office, Washington, D. C., 1961. Introduction page x:**

> "• • • On the basis of an independent demographic analysis, however, it seems likely that the true net underenumeration was closer to 3 percent and that the enumeration of the Post-Enumeration Survey had some of the same kinds of limitations as those of the decennial census, although in a lesser degree."

This inherent error in the census statistics is alluded to by the court in determining the validity of a congressional redistricting act in **Exon v. Tiemann**, 279 F.Supp. 609, l.c. 612 (1968). This 3% error in the census data is universally recognized as insignificant. Is it not equally true that population variations in congressional districts of 3% based upon this census data are equally insignificant?

Appellees' simplistic approach of bettering adjacent districts by the transfer of a county, basing such transfers on raw census data, also totally ignores the reality of shifting populations which took place from 1960 to 1967. Appellants have brought these realities to the attention of the court in their brief (pages 82-84, Appellant's Brief on the Merits). In determining the reasonableness of legislative action in 1967 the court must be cognizant of the imperfections in the population data which was available to the legislature.

IV.

Appellees have erroneously applied burden of proof standards to this case. (Pages 7-11, Appellee's Brief).

Appellees have raised a technical argument in their brief, the substance which is that the findings of the lower court cannot be set aside unless clearly erroneous. Various cases are cited in support of this principle. One of these cases, **United States v. United States Gypsum Co.**, 333 U.S. 364, 92 L.Ed. 746, 68 S.Ct. 525 (1948) is an instance where this court unanimously overturned findings of fact made by a United States District Court.

> "* * * That rule [Rule 52 (a), Federal Rules of Civil Procedure] prescribes that findings of fact in actions tried without a jury 'shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous.' * * *" **(United States v. United States Gypsum Co.**, supra, 333 U.S. at 394, 395, 92 L.Ed. 765, 766.)

Appellants noted in detail in their Brief on the Merits what were considered to be significant "clearly erroneous" findings of fact (Pages 61-84). Appellees have not supported these disputed findings. For example, Appellants attacked the finding of the lower court "* * * that the 1967 Missouri Legislature in fact rejected plans that * * * would have produced a congressional districting plan that would have been in closer compliance with the constitutional command of Art. I, § 2." (**Preisler v. Secretary of State of Missouri**, 279 F.Supp. 952, 965; Pages 13-14, Appendices to Juris. State.). Appellants demonstrated the fallacy of this finding (Pages

62-63, Appellants' Brief) and Appellees made no response thereto. When an appealing party challenges certain findings of fact, and the responding party makes no effort to sustain such findings, it is difficult to see how the reviewing court has much choice but to deem the findings "clearly erroneous."

This standard of review varies in its application in accordance with the subject matter of the case under review. Appellees also cite in support of the standard they desire applied to this case, **Commissioner v. Duberstein**, 363 U.S. 278, 4 L.Ed.2d 1218, 80 S.Ct. 1190 (1960). This case is authority for the principle that a reviewing court shall give great deference to the expertise of a lower tribunal. In the cited case separate judgments of the United States Tax Court and a United States District Court were under review. The Tax Court, of course, is universally recognized for its expertise in its field. This recognition of expertise is not accorded courts of general jurisdiction such as the United States district courts. It is interesting to note in **Commissioner v. Duberstein** that this court recognized the expertise of the Tax Court by affirming the judgment of the Tax Court and refused to recognize any expertise in the district court by reversing the judgment of that court.

Certainly it cannot be validly argued that the United States district courts are tribunals of expertise in the area of legislative apportionment to which this court should accord great deference. Legislative apportionment cases are truly sui generis and the expertise in this area of the law resides in this court. A study of the legislative apportionment cases reaching this court reflects that this court treats such cases de novo. This is as it should be on the judicial frontiers of representative apportionment and is reflected by the following table:

LEGISLATIVE APPORTIONMENT CASES APPEALED TO UNITED STATES SUPREME COURT.

Affirmed

Alton v. Tawes, 384 U.S. 315, 16 L.Ed.2d 586, 86 S.Ct. 1590, (1966).

Branigin v. Duddleston, Nos. 1252, 1263, ___ U.S. ___, 20 L.Ed.2d 641, 88 S.Ct. 1666, (1968).

Connor v. Johnson, 386 U.S. 483, 18 L.Ed.2d 224, (1967), 87 S.Ct. 1174.

Davis v. Mann, 377 U.S. 678, 12 L.Ed.2d 609, 84 S.Ct. 1453, (1964).

Dinis v. Volpe, 389 U.S. 570, 88 S.Ct. 692, (1968), 19 L.Ed.2d 785.

Drum v. Seawell, (1966), 383 U.S. 831, 16 L.Ed.2d 298, 86 S.Ct. 1237.

Dusch v. Davis, 387 U.S. 112, (1967), 87 S.Ct. 1554, 18 L.Ed.2d 656.

Hill v. Davis, 378 U.S. 565, 12 L.Ed.2d 1037, 84 S.Ct. 1918, (1964).

Kirk v. Gong, 389 U.S. 574, (1968), 19 L.Ed.2d 784, 88 S.Ct. 695.

Kirkpatrick v. Preisler, 385 U.S. 450, 17 L.Ed.2d 511, 87 S.Ct. 613, (1967).

Martin v. Bush, 376 U.S. 222, (1964), 11 L.Ed.2d 656, 84 S.Ct. 709.

Nolan v. Rhodes, 383 U.S. 104, 15 L.Ed.2d 616, 86 S.Ct. 716, (1966).

Reversed

Avery v. Midland County, (1968), 390 U.S. 474, 20 L.Ed.2d 45, 88 S.Ct. 1114.

Burns v. Richardson, 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376, (1966).

Duddleston v. Grills, 385 U.S. 455, 17 L.Ed.2d 508, 87 S.Ct. 611, (1967).

Germano v. Kerner, 378 U.S. 560, 12 L.Ed.2d 1034, 84 S.Ct. 1908, (1964).

Hearne v. Smylie, 378 U.S. 563, 12 L.Ed.2d 1036, 84 S.Ct. 1917, (1964).

Kilgarlin v. Hill, 386 U.S. 120, 87 S.Ct. 820, 17 L.Ed.2d 771, (1967).

Lucas v. Colorado General Assembly, 377 U.S. 713, 12 L.Ed.2d 632, 84 S.Ct. 1472, (1964).

Lucas v. Rhodes, 389 U.S. 212, 19 L.Ed.2d 423, 88 S.Ct. 416, (1967).

Maryland Committee for Fair Rep. v. Tawes, 377 U.S. 656, (1964), 12 L.Ed.2d 595, 84 S.Ct. 1442.

Nolan v. Rhodes, 378 U.S. 556, 12 L.Ed.2d 1034, 84 S.Ct. 1906, (1964).

Swann v. Adams, 378 U.S. 553, 12 L.Ed.2d 1033, 84 S.Ct. 1904, (1964).

Swann v. Adams, 385 U.S. 440, 17 L.Ed.2d 501, 87 S.Ct. 569, (1967).

Affirmed

Parsons v. Buckley, 379 U.S. 359, 13 L.Ed.2d 352, 85 S.Ct. 503, (1965).

Pinney v. Butterworth, 378 U.S. 564, 12 L.Ed.2d 1037, 84 S.Ct. 1918, (1964).

Reynolds v. Sims, 377 U.S. 533, 12 L.Ed.2d 506, (1964), 84 S.Ct. 1362.

Rockefeller v. Wells, 389 U.S. 421, 19 L.Ed.2d 651, 88 S.Ct. 578, (1967).

Roman v. Sincock, 377 U.S. 695, 12 L.Ed.2d 620, 84 S.Ct. 1462, (1964).

WMCA v. Lomenzo, 382 U.S. 4, 15 L.Ed.2d 2, 86 S.Ct. 24, (1965).

Williams v. Moss, 378 U.S. 558, 12 L.Ed.2d 1026, 84 S.Ct. 1907, (1964).

Wright v. Rockefeller, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512, (1964).

Reversed

WMCA v. Lomenzo, 377 U.S. 633, 12 L.Ed.2d 568, 84 S.Ct. 1418, (1964).

Wesberry v. Sanders, (1964), 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481.

CONCLUSION.

Appellees advance other arguments which in substance amount to a simple denial or comprehensive arguments developed in Appellants' brief. Appellants see no useful purpose in replying to what amounts to a general denial. Thus, no reply is made to Argument 1, page 5, Argument 3, page 11, Argument 6, page 24, and Argument 7, page 24 of Appellees' brief. Affirmative arguments on these points are fully developed in Appellants' Brief on the Merits.

Appellants again urge this court to reverse the judgment of the lower court and remand the cases with instructions that the 1967 Missouri Congressional Redistricting Act be declared constitutional. The relatively small variation in population of the districts therein, the questionable value of 1960 census data to 1967 redistricting and judicial recognition and appreciation of the legislative process warrant such action.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

JAMES C. KIRKPATRICK, Secretary of State of Missouri, and NORMAN H. ANDERSON, Attorney General of Missouri,

Appellants,

and

F. V. HEINKEL, R. J. ROSIER, W. W. BECKETT, A. D. SAPPINGTON, L. O. WALLIS, MILLER HERN, HERMAN HETLAGE, HERMAN KERTZ, TURPIN YOUTSEY and GLEN MYERS,

Intervenor-Appellants,

vs.

PAUL W. PREISLER, LOUISE ERBE, BOSTIC J. FRANKLIN, LUCILE RIEDEL, DOROTHY CHILDS, SARAH RIFKIN, and MARTHA LEONARD,

Appellees.

Nos. 1116 & 1117.

On Appeal from the United States District Court For the Western District of Missouri Central Division.

SUPPLEMENTAL REPLY BRIEF (RULE 41-5).

Subsequent to filing of Appellants' reply brief, there was promulgated the opinion of this court in **Brotherhood of Locomotive Firemen and Enginemen, et al. v. Chicago Rock Island and Pacific Railroad Company, et al.**, Nos. 16 and 18, October Term, 1968, (November 18, 1968; 37 Law Week 4032).

Appellants believe that the **Brotherhood of Locomotive Firemen** opinion supports their argument that the District Court for the Western District of Missouri improperly assumed the legislative role under the guise of judicial review when invalidating the 1967 Missouri Congressional Redistricting Act.

> "We think it plain that in striking down the full-crew laws on this basis, the District Court indulged in a legislative judgment wholly beyond its limited authority to review state legislation under the Commerce Clause. (37 Law Week 4034)
>
> • • •
>
> "This summary, taken from evidence heavily relied upon by the railroads and generally favorable to their position, leaves little room for doubt that the question of safety in the circumstances of this case is essentially a matter of public policy, and public policy can, under our constitutional system, be fixed only by the people acting through their elected representatives. **The District Court's responsibility for making 'findings of fact' certainly does not authorize it to resolve conflicts in the evidence against the legislature's conclusion or even to reject the legislative judgment on the basis that without convincing statistics in the record to support it, the legislative viewpoint constitutes nothing more than what the District Court in this case said was 'pure speculation'.**" (37 Law Week 4035) (Emphasis added)
>
> • • •
>
> "Although the railroads claim that other criteria could provide a more precise test of the situations where a larger crew is desirable, these other standards have inadequacies of their own, and are for the most part far too vague to provide a basis for a statutory classifica-

tion. **And in any event the courts may not force a state legislature to attain scientific perfection in determining the coverage of statutes of this type.** (37 Law Week 4036) (Emphasis added)

• • •

"As we have said many times, Congress unquestionably has power under the Commerce Clause to regulate the number of employees who shall be used to man trains used in interstate commerce. **In the absence of congressional action, however, we cannot invoke the judicial power to invalidate this judgment of the people of Arkansas and their elected representatives as to the price society should pay to promote safety in the railroad industry.**" (37 Law Week 4036) (Emphasis added)

Appellants also understand the **Brotherhood of Locomotive Firemen** cases to be a ruling that in testing the constitutionality of a state statute, this Court, on appeal from a Federal District Court, will give the benefit of the doubt to the state legislature. In other words, the "findings of fact" by the District Court were given no especial deference or presumption of validity by this Court, but instead such was accorded the "findings of fact" by the Arkansas legislature. Appellants naturally urge a similar approach by this Court in the instant cases.

Respectfully submitted,

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No. 30

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

JAMES C. KIRKPATRICK, et al.,
Appellants,

vs.

PAUL W. PREISLER, et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, CENTRAL DIVISION

PETITION FOR REHEARING

The Appellants, James C. Kirkpatrick and John C. Danforth (who succeeded Norman H. Anderson as Attorney General of Missouri on January 13, 1969 and therefore is automatically substituted for him as a party pursuant to Rule 48.3) move the court as follows:

1. To withdraw the opinion filed in this case on April 7, 1969.

2. To grant a rehearing of the case with opportunity for additional briefing and oral argument.

3. To permit participation *amicus curiae* of any other state which desires to participate.

In the alternative, the Appellants move the Court to modify the opinion of April 7, 1969, and any judgment or mandate entered on the basis of that opinion, and to permit the 1970 congressional elections in the state of Missouri to be held from the districts as established by the Missouri General Assembly in 1967.

FOREWORD

It is coincidental that at the very moment that this case was being argued by Thomas J. Downey, Esq., First Assistant to Attorney General Norman H. Anderson, John C. Danforth was being sworn in as General Anderson's successor after having prevailed against him in the election of November 5, 1968.

The case therefore comes to the present administration of the Attorney General's office at the opinion stage. We now have the responsibility of advising the legislature and other state authorities on the requirements of the opinion, and of presenting the case for the state in further proceedings in this court and the court below.

We perhaps have the advantage of a fresh look at the case. We have no intention of detracting from the prior presentation. We have given careful attention to the briefing and to the oral argument as shown in the transcript. Both appear to us to be outstanding. Yet, viewing the case for the first time, the problems presented by the opinion and by the future proceedings it requires seem to be very serious ones. The emphasis on precise mathematical equality, in our opinion, virtually ousts the legislature from reapportionment matters except in the rare and hardly de-

sirable situation in which a dominant majority could force a prearranged plan through both houses without amendment. This state of affairs, we believe, impedes representative government rather than affording the people better representation.

Since the responsibility is now with this office, and since we must now proceed under the commands of the opinion, we would appreciate the opportunity for a rehearing and for additional briefing and oral argument.

ARGUMENT

I. The opinion of April 7, 1969, goes far beyond existing authority in the requirement that a state "make a good faith effort to achieve precise mathematical equality," and that the state "must justify any variance, no matter how small." The decision not only places in jeopardy the apportionments in most of the states, but also any future attempts that the State of Missouri or other states might make.

Prior to the present decision most of those concerned with reapportionment proceeded on the basis that mathematical exactitude was not the exclusive consideration, *Wesberry* v. *Sanders*, 376 U.S. 1 (1964), and that it was possible to give some attention to existing political boundaries. *Reynolds* v. *Sims*, 377 U.S. 533, 577, 578-9, 586 (1964). *Burns* v. *Richardson*, 384 U.S. 73 (1966), also indicated a flexibility which the present opinion rejects.

The present case initially presented a rather narrow issue. Missouri's 1967 congressional redistricting created districts which were more nearly equal than those existing in any state which had more than one representative in 1964 (See appendix to dissenting opinion of Mr. Justice Harlan in *Wesberry* v. *Sanders*, *supra*), and which were more nearly equal than those existing in the majority of the

states at the present time.[1] The District Court nevertheless rejected the plan, assigning reasons as follows:

(a) Because the legislature, inadvertently and not in bad faith, made use of a map in which some of the county population figures had been erroneously entered;[2]

(b) Because a shift of counties in four instances could have produced districts more nearly approaching equality (App. Jur. Stat., p. 68); and

(c) Because a plan providing for districts more nearly equal in population had been rejected by the legislature.[3]

The District Court was willing to accept the legislature's use of "building blocks" composed of counties in the outstate areas and precincts in the urban areas. It appended three maps to its opinion (App. Jur. Stat., pp. 39-41, 279 F. Supp. l.c. 979-981), presumably to illustrate plans which the majority would approve, and these made use of "building blocks" of counties and precincts. The thrust of the District Court opinion was not that the 1967 plan was a bad one, but that it was not so good as it might have been even by using the building blocks of the type that were used.

Wells v. *Rockefeller*, No. 238 O.T. 1968, argued with this case, involved a similarly narrow issue. The New York legislature had divided the state into eight regional classes, with a very great degree of equality within each class, but with variations between districts in different classes. The

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1. See table, pp. 55-56 of Appellant's Brief on the merits, indicating only ten states having congressional districts more nearly uniform than Missouri's.

2. The District Court specifically stated that it did not question the good faith of the legislators with regard to this map. See Footnotes to App. to Jurisdictional Statement, F.N. 2, p. 3.

3. Judge Collinson specifically disclaimed the rejection of a plan having more nearly uniform districts as a basis for his concurrence. App. to Jur. Stat., p. 97. Judge Matthes, of course, dissented.

variations were greater than in the Missouri case. The basic question was the validity of the emphasis on regional classification.

The Court now enunciates rules and standards which are not found in any prior case, as follows:

> "... the 'as nearly as practicable' standard requires that the state make a good-faith effort to achieve precise mathematical equality...." (Slip opn., p. 4).
>
> "... Unless population variances among congressional districts are shown to have resulted despite such effort, the state must justify each variance, no matter how small." (Ibid.).
>
> "... the command of Article I, Section 2 ... permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown...." Id. p. 5.

The two opinions of April 7, 1969 appear to reject any reliance whatsoever on political subdivisions in establishing the boundaries of congressional districts (Slip opn., p. 7; Slip opn. *Wells* v. *Rockefeller*, p. 5). These holdings go well beyond previous decisions. There is a need for further consideration, as follows:

(i) Many other states have felt, on the basis of *Wesberry* v. *Sanders, supra,* and *Reynolds* v. *Sims, supra,* that they were entitled to give consideration to political boundaries in establishing congressional districts.

(ii) The state of Missouri, in particular, is forced to undergo another redistricting for a single election, without reliable guidance. Even the three plans suggested by the District Court are of doubtful validity, under the language of the opinion of this Court.

The congressional districts in virtually every state are in jeopardy, and there are no reliable guidelines for revision.[4]

II. The opinion has the inevitable and predictable effect of forcing courts to draw district lines themselves in any case in which legislative apportionment is challenged.

It is perhaps not difficult for a person working alone to prepare an apportionment plan with districts that are substantially equal in population. He would need assurance, however, that nobody else would interfere with his efforts or work for changes.

Any proposal for modification would place the entire plan in jeopardy. If the proposal has the slightest effect of increasing the variation between one district and another, it will be charged that the apportioning agency has ". . . rejected a redistricting plan submitted to it which provided for districts with smaller population variances among them. . . ." (Slip Opin., p. 3). It is also said that ". . . The legislature may not accept population variances, large or small, in order to create districts with specific interest orientations. . . ." (Ibid., p. 6). It may even be charged that a legislator who proposes a change in a plan in order to achieve a district which he feels to be more representative of the interests of his constituents is not "acting in good faith."

The legislature must also proceed under the stern injunction that it may never rely on the "de minimis" concept in order to justify any "numerical or percentage population variance." (Ibid., p. 4.) The legislature is told

4. Experienced Washington correspondent James Millstone suggests that all but six states may have to redraw district boundaries on the basis of the present decision. This includes five states which drew new boundaries for the 1968 elections. St. Louis Post Dispatch, April 15, 1969, p. 1-B.

that ". . .. the State must justify each variance, no matter how small." (Ibid.)

State legislatures have not followed the practice of filing findings of fact and conclusions of law in justification of their actions. Sometimes a legislative act will have a preamble to express the reason for legislative concern, but this is normally prepared in comparative leisure at the drafting stage. We cannot expect a contemporaneous justification for each amendment to a reapportionment bill, as it is tendered and considered. The legislature might conceivably prepare an "address to the voters" to accompany an enactment, but this would simply be an apology and would be rejected as summarily as similar arguments in briefs have been. What the opinion really means is that no justification for a population variance could ever withstand challenge. At the very least, a legislature could never rely on the acceptability of such a variance.

The problems introduced by his opinion would not be solved if the redistricting were done by a "bipartisan" commission or other non-legislative body. If the commission had a plural or diverse membership it would face the same problems that the legislature has. One who would suggest any variation in a mathematically precise proposal would risk the invalidation of the entire proposal. The problems of justification would be equally insoluble.

Even the slightest error in computation made during legislative stress might lead to the rejection of the entire plan.

An opponent of a proposal for redistricting might find that his best strategy lay in introducing a deliberate variance. He would not even have to disclose his true

purpose, and could suggest an entirely different motivation. United States District Courts, and state courts, would feel that they had to reject any plan which contains a perceptible and unexplained population differential among districts, in compliance with the opinions of April 7, 1969.

Court challenge to any reapportionment would not only be possible, but inevitable. Some will oppose any reapportionment, for reasons having nothing to do with population. They could go to court, thereby leaving the political situation uncertain until the court could examine the plan and reach a decision. Appeals could lengthen the period of uncertainty. The uncertainty would weigh especially heavily on those who were interested in challenging the incumbent congressmen at the polls.

Under this state of authorities the only safe course for the legislature is to throw up the entire task of apportionment, and insist that the lines be drawn by a court. In seven cases reapportionment has already been done by courts,[5] and more court redistrictings seem inevitable. We show in our next point that court reapportionment is highly undesirable in a state such as Missouri, and that it should be looked to only as a last resort.

A strong and unified party leadership might prepare a bill with districts approaching mathematical equality and might then force it through the legislature without amendment. Such strong-arm tactics by the majority would apparently satisfy the test of the opinion, however disadvantageous the situation might be from the stand-

5. See table on pp. 29-34 of Appellant's Brief on the merits, and also *Koziol* v. *Burkhart*, 241 A.2d 451 (N.J., 1968). The court below indicated that it had in mind the possibility of having to draw congressional district lines, and commented to the procedure it might follow. See App. Jur. Stat., p. 20; 279 F. Supp. 952, 969.

point of representative government. It is patent however that a bill achieved through normal legislative processes, with floor amendment, would probably fall short of the "mathematical equality" standard of the opinion. In almost all instances it would be possible to find means for "improvement" in a plan through transfer of a precinct or a rural township.

The present opinion simply does not allow the normal legislative processes to function, if the legislature is composed of diverse interests.

III. The agency which determines the boundaries of legislative districts inevitably determines the politics of these districts. Such decisions are highly inappropriate for courts.

The politically sophisticated are quick to recognize the political implications of any proposal for reapportionment, or of any suggested changes in such a proposal, from the bare description of districts and boundaries.

Missouri furnishes an excellent illustration of the point. The state is generally considered a "Democratic" state, but there is also a substantial Republican vote. The incumbent governor, a Democrat, is said to have achieved reelection by a landslide in 1968, in receiving 60.5 percent of the total vote. (1,063,495 to 688,300.) The 1968 senatorial contest was decided by 35,000 votes.[6]

The various counties have political characteristics which are widely known and fairly predictable. The figures which follow will illustrate:

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6. Figures are from Roster of State, District and County Officers, published by James C. Kirkpatrick, Secretary of State, Jefferson City, 1969, containing election returns.

REPUBLICAN COUNTIES

	Republican	Democrat
Ozark (Southwest)	1951	728
Mercer (Center, Iowa Line)	1421	821
Gasconade (East Center)	4425	1349

DEMOCRATIC COUNTIES

New Madrid (Southeast "Bootheel")	2735	5644
Monroe (East Center)	1440	3073
Ray (West Center)	2740	3963

The figures just quoted are taken from the extremely close senatorial race in 1968, in order to minimize variations which might be attributed to the particular congressional candidates. Congressional figures, and figures for prior years, are comparable.

A decision to place any one of these counties in a particular district, then, is a decision with strong and evident political overtones. The effect of traditional voting factors in apportionment is illustrated by the Seventh Congressional District of Missouri, in the extreme southwest corner of the state. The Republican candidate for Congress won by 53,000 votes in 1968 and carried every county. The adjoining districts elected Democrats by margins of twelve to twenty-nine thousand. It is apparent that rearrangement of counties might produce a change in representation.

In the legislative proceedings giving rise to the 1967 redistricting, two questions were emphasized at all stages, as follows:

(i) Was there to be a district which could be expected to elect a black congressman?

(ii) Was the St. Louis "suburban" district to be laid out in such a way that it would normally elect a Republican?

Some proposals, including one which was advanced in the House of Representatives and which some claimed to be closer mathematically than the plan finally enacted, would have answered both questions in the negative. Republican members then formed a temporary coalition with black legislators, all of whom were Democrats, to pursue their mutual interests. The coalition achieved success in the bill which was adopted.

Following the entry of the order of the District Court from which this appeal is taken, and before it was known that this Court would allow the 1968 elections to proceed on the basis of the 1967 districting and would hear argument, some Missouri legislators introduced a plan which would have reversed the effect of the 1967 reapportionment with respect to the First (black majority) and Second (Republican majority) districts, and which had wide support. It appeared, therefore, that the coalition would have to be revived to defend the gains which were achieved in 1967.[7]

We suggest that a black legislator is acting with entire propriety in trying to establish a congressional district in which a person of his race can probably secure election, and that minority Republican legislators are acting properly in striving for as many districts as possible in which their party's candidates have a chance. There is complete good faith in each instance. Under the Court's opinion, however, legislators are inhibited in the pursuit of their particular and legitimate goals through the necessity of

7. These efforts had nothing to do with making the districts larger or smaller in population. Four of the ten districts have wider population variances than do the first and second (see Appellants' Brief p. 10).

striving for mathematical equality at all cost. A legislator seeking a district of particular composition has no purpose at all of introducing inequalities in population, but such inequalities may creep in whenever adjustments in lines are proposed. It is possible to have only so many balls in the air at the same time!

The drawing of boundaries is a highly political decision. There is no answer which is "right" or "wrong." The problem is inherent in representative government.

By contrast, a court is a singularly inappropriate vehicle for drawing the boundary lines of districts. Is the Court to decide whether or not there is to be a black congressman? Is the court to say whether or not the Republican voters are to be dispersed or concentrated? Any perceptive judge will sense the political implications in a proposed boundary or shift in boundaries, at a glance. He will have the same realization if he reviews a plan prepared by a master or other assistant. This is so even though he is entirely impartial and apolitical in his approach.

When judges make decisions which involve inherent and unavoidable political factors, there is danger that many members of the public will not accept the holdings as judicial decisions. The prior political affiliations of the participating judges will be aired and political motivation will be charged. Public confidence in the judiciary might well be impaired.

We do not suggest for a minute that a judge should omit any duty because of fear of political reaction. What we do suggest is that the Court, by permitting a degree of leniency in the standards expounded in the opinion of April 7, 1969, can give relief in a situation in which almost all reapportionments will be forced into the courts be-

cause of the sheer impossibility of legislative resolution. The arbitrary decisions in the drawing of district lines are highly inappropriate for the judiciary. The disruption of the normal balance among the branches of the government heavily outweighs the very slight gains which may be expected from a mathematical preciosity. This is especially so since a mathematical equality based on census figures remains valid only for the barest moment.

IV. The opinion produces a result which is undesirable from the standpoint of representative government.

We ask simply that there be some flexibility—some recognition of the thought of Mr. Justice Holmes as expressed in *Bain Peanut Co.* v. *Pinson*, 282 U.S. 499, 501 (1931), as follows:

> "We must remember that the machinery of government would not work if it were not allowed a little play in its joints."

The Chief Justice has quoted this sentiment with apparent approval in *Reynolds* v. *Sims*, 377 U.S. 533, 577 (1964). The present opinion utterly demolishes it.

We understand, of course, that the Court's purpose is to provide better representation for the people. The emphasis on mathematics, however, does not accomplish this purpose. It rather makes for a poorer representation.

The point is illustrated by a map on page 39 of the Appendix to Jurisdictional Statement, which contains a map suggested by the majority of the District Court as indicating an acceptable reapportionment (279 F. Supp. 979). This map indicates a variation of 4500 between the 7th and the 8th Districts, and then indicates that the variation could be reduced to 12 by "transfer of particular townships in Dallas or Laclede Counties."

If this Court's opinion stands, then it would appear that such a transfer of townships would be essential to a valid plan. The ostensible reason would be to give the voters in the transferred townships better representation. Their votes would supposedly be worth less in a district in which more people lived. Such is the logic of a rule of mathematical equality.

This approach is completely divorced from reality. People simply do not think in terms of townships which, in Missouri, are simply polling units. A voter might know which township he was in, from inquiring as to where to vote, but he would have no reason even to ascertain the township boundaries. The detached townships would be political orphans. Many voters would have no idea who represented them in Congress. The inevitable effect of the opinion is to increase the distance between the representatives and their constituents.

V. Even if the Court adheres to the opinion in toto, it should permit the 1970 Congressional elections to be held on the basis of the districts as now established: (a) Because the 1967 apportionment is reasonably fair on its face; (b) because there is no assurance that reapportionment on the basis of the obsolete 1960 census figures would produce a greater uniformity than now exists; (c) because the constant changing of districts inhibits the voters in holding their representatives responsible; and (d) because the gains from a one-time reapportionment would be outweighed by the diversion of the legislature from pressing tasks.

We appreciate the consideration that the Court has shown in allowing the 1968 elections to proceed on the basis of the 1967 reapportionment which it now finds to be invalid. We would not ask for further indulgence, in the absence of a grant of full rehearing, were it not for the circumstance that the 1970 Congressional elections are the last ones to be held on the basis of the 1960 census.

The requirement of a reapportionment for a single election, however, would amount to a penalty against the state of Missouri, its citizens, and its legislature, for an offense which was not wilful or deliberate, simply because the Court has now taken a more rigid view of reapportionment than would appear on the basis of the earlier opinions. No substantial public benefit could be expected from a 1970-only reapportionment, and there might be serious public disadvantage.

The present Missouri districts are not badly apportioned. As we have shown in Point I, there is greater population uniformity than was the case in any state having more than one representative in 1964, and than is presently the case as to the great majority of the states. Citizens suffer dilution of their votes, not because of misapportionment, but because of population changes since 1960. Yet it is so difficult to secure accurate information about these population shifts that any attempted apportionment on the basis of estimated shifts in population would be in danger if the assumptions could not be shown to be precise and accurate. There is a risk in any apportionment which is not tied into the census.

Another disadvantage of constant reapportioning is that legislators are not held to answer to the constituents who chose them. Missouri elected three new congressmen in 1968. If the Court does not grant relief, they must run from different districts in 1970 and from still other districts in 1972. This circumstance interposes an additional barrier between the representative and the represented, and might operate to deprive the state of the benefits of seniority in representation.

We plead finally for consideration of the particular problems of the Missouri legislature. We will not argue that they are more severe than those which face other

legislatures, but they are typical. The state faces a financial crisis, with many varying opinions about sources for additional revenue. The crisis is particularly severe with respect to public education. The two urban areas face particular problems for which they have called on the legislature for help. All of these are in addition to the normal run of legislative problems. It would be unfortunate to add problems of reapportionment at this time, especially since they have proved to be so difficult. Nor would it be a solution to suggest that the legislators forbear use of normal legislative techniques in the consideration of reapportionment, or "rubber stamp" the first proposal that seems to be mathematically equal.

Some favor reapportionment by "bipartisan" commission, and a constitutional amendment has been introduced for this purpose. House Joint Resolution 8, 75th General Assembly of Missouri, is a proposal for constitutional amendment which must be submitted to the voters if the legislature approves it. The amendment would offer a solution to apportionment problems following the 1970 census and, hopefully, there could then be a single apportionment which would last for ten years. But there would be great difficulty in getting the amendment passed, commissioners appointed and a report prepared in time for the 1970 congressional elections. One who wanted to stand for Congress would have difficulty in finding out what district he had to run from.

Any plan submitted by any means, moreover, would have to pass the scrutiny of the District Court with no assurance of approval.

The Court's initial reaction might be that the unfortunate situation just described may not be adjusted by allowing malapportioned districts to remain. This might be a meritorious approach if there were any indication that

reapportionment on the basis of the 1960 census figures would yield more uniform districts. Yet the very opposite is probable. To require a reapportionment for this single election, then, would be to strive for a meaningless goal.

CONCLUSION

The opinion of April 7, 1969, should be withdrawn and a full rehearing granted, with opportunity for additional briefing and argument and for participation of other states.

In the alternative, the Court should permit the 1970 congressional elections to be held on the basis of the present districts, as established by the 1967 legislature.

Respectfully submitted,

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CERTIFICATE

I certify that the within petition for rehearing is presented in good faith and not for delay, and that I believe that it is meritorious.

April 30, 1969.

CHARLES B. BLACKMAR
Counsel for Appellants

SUPREME COURT OF THE UNITED STATES

Nos. 30 and 31.—October Term, 1968.

James C. Kirkpatrick, Secretary of State of Missouri, et al., Appellants, 30 v. Paul W. Preisler et al.	On Appeals From the United States District Court for the Western District of Missouri.
F. V. Heinkel et al., Appellants, 31 v. Paul W. Preisler et al.	

[April 7, 1969.]

Mr. Justice Brennan delivered the opinion of the Court.

In *Wesberry* v. *Sanders*, 376 U. S. 1 (1964), we held that "[w]hile it may not be possible [for the States] to draw congressional districts with mathematical precision," *id.*, at 18, Art. I, § 2 of the Constitution requires "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Id.*, at 7–8. We are required in this case to elucidate the "as nearly as practicable" standard.

The Missouri congressional redistricting statute challenged in this case resulted from that State's second attempt at congressional redistricting since *Wesberry* was decided. In 1965, a three-judge District Court for the Western District of Missouri declared that the Missouri congressional districting Act then in effect was unconstitutional under *Wesberry* but withheld any judicial relief "until the Legislature of the State of Missouri has once more had an opportunity to deal with the problem . . . ." *Preisler* v. *Secretary of State of Missouri*, 238 F. Supp. 187, 191 (1965). Thereafter, the General Assembly of Missouri enacted a redistricting statute, but this statute too was declared unconstitutional. The District Court, however, retained jurisdiction to review any

further plan that might be enacted. *Preisler* v. *Secretary of State of Missouri*, 257 F. Supp. 953 (1964), aff'd, *sub nom. Kirkpatrick* v. *Preisler*, 385 U. S. 450 (1967). In 1967, the General Assembly enacted the statute under attack here, Mo. Rev. Stat., c. 128 (Cum. Supp. 1967), and the Attorney General of Missouri moved in the District Court for a declaration sustaining the Act and an order dismissing the case.

Based on the best population data available to the legislature in 1967, the 1960 United States census figures, absolute population equality among Missouri's 10 congressional districts would mean a population of 431,981 in each district. The districts created by the 1967 Act, however, varied from this ideal within a range of 12,260 below it to 13,542 above it. The difference between the least and most populous districts was thus 25,802. In percentage terms, the most populous district was 3.13% above the mathematical ideal, and the least populous was 2.83% below.[1]

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[1] The redistricting effected by the 1967 Act, based on a population of 4,319,813 according to the 1960 census, is as follows:

District No.	*Population.*	*% Variation From Ideal.*
One	439,746	+ 1.8
Two	436,448	+ 1.03
Three	436,099	— .95
Four	419,721	— 2.84
Five	431,178	— .19
Six	422,238	— 2.26
Seven	436,769	+ 1.11
Eight	445,523	+ 3.13
Nine	428,223	— .87
Ten	423,868	— 1.88
Ideal population per district		431,981
Average variation from ideal		1.6%
Ratio of largest to smallest district		1.06 to 1
Number of districts within 1.88% of ideal		7
Population difference between largest and smallest districts		25,802

The District Court found that the General Assembly had not in fact relied on the census figures but instead had based its plan on less accurate data. In addition, the District Court found that the General Assembly had rejected a redistricting plan submitted to it which provided for districts with smaller population variances among them. Finally, the District Court found that the simple device of switching some counties from one district to another would have produced a plan with markedly reduced variances among districts. Based on these findings, the District Court, one judge dissenting, held that the 1967 Act did not meet the constitutional standard of equal representation for equal numbers of people "as nearly as practicable," and that the State had failed to make any acceptable justification for the variances. 279 F. Supp. 952 (1967). We noted probable jurisdiction but stayed the District Court's judgment pending appeal and expressly authorized the State "to conduct 1968 congressional elections under and pursuant to [the] 1967 . . . Act . . . ." 390 U. S. 939 (1968). We affirm.

Missouri's primary argument is that the population variances among the districts created by the 1967 Act are so small that they should be considered *de minimis* and for that reason to satisfy the "as nearly as practicable" limitation and not to require independent justification. Alternatively, Missouri argues that justification for the variances was established in the evidence: it is contended that the General Assembly provided for variances out of legitimate regard for such factors as the representation of distinct interest groups, the integrity of county lines, the compactness of districts, the population trends within the State, the high proportion of military personnel, college students, and other nonvoters in some districts, and the political realities of "legislative interplay."

I.

We reject Missouri's argument that there is a fixed numerical or percentage population variance small enough to be considered *de minimis* and to satisfy without question the "as nearly as practicable" standard. The whole thrust of the "as nearly as practicable" approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case. The extent to which equality may practicably be achieved may differ from State to State and from district to district. Since "equal representation for equal numbers of people [is] the fundamental goal for the House of Representatives," *Wesberry* v. *Sanders*, *supra*, at 18, the "as nearly as practicable" standard requires that the State make a good-faith effort to achieve precise mathematical equality. See *Reynolds* v. *Sims*, 377 U. S. 533, 577 (1964). Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small.

There are other reasons for rejecting the *de minimis* approach. We can see no nonarbitrary way to pick a cutoff point at which population variances suddenly become *de minimis*. Moreover, to consider a certain range of variances *de minimis* would encourage legislators to strive for that range rather than for equality as nearly as practicable. The District Court found, for example, that at least one leading Missouri legislator deemed it proper to attempt to achieve a 2% level of variance rather than to seek population equality.

Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives. Toleration of even small deviations detracts from these purposes. Therefore, the command of Art. I, § 2,

that States create congressional districts which provide equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown.

Clearly, the population variances among the Missouri congressional districts were not unavoidable. Indeed, it is not seriously contended that the Missouri Legislature came as close to equality as it might have come. The District Court found that, to the contrary, in the two reapportionment efforts of the Missouri Legislature since *Wesberry* "the leadership of both political parties in the Senate and the House were given nothing better to work with than a makeshift bill produced by what has been candidly recognized to be no more than . . . an expedient political compromise." 279 F. Supp., at 966. Legislative proponents of the 1967 Act frankly conceded at the District Court hearing that resort to the simple device of transferring entire political subdivisions of known population between contiguous districts would have produced districts much closer to numerical equality. The District Court found, moreover, that the Missouri Legislature relied on inaccurate data in constructing the districts, and that it rejected without consideration a plan which would have reduced markedly population variances among the districts. Finally, it is simply inconceivable that population disparities of the magnitude found in the Missouri plan were unavoidable.[2] The New York apportionment

[2] Contrary to appellant's assertion, we have not sustained the constitutionality of any congressional districting plan with population variances of the magnitude found in the Missouri plan. In *Connor* v. *Johnson*, 386 U. S. 483 (1967), the only issue presented to this Court was whether the districting plan involved racial gerrymandering. *Alton* v. *Tawes*, 384 U. S. 315 (1966), and *Kirk* v. *Gong*, 389 U. S. 574 (1968), involved situations where the lower courts themselves had reapportioned the districts on an emergency basis,

plan of regions divided into districts of almost absolute population equality described in *Wells* v. *Rockefeller*, *post*, at ——, provides striking evidence that a state legislature which tries can achieve almost complete numerical equality among all the State's districts. In sum, "it seems quite obvious that the State could have come much closer to providing districts of equal population than it did." *Swann* v. *Adams*, 385 U. S. 440, 445 (1967).

We therefore turn to the question whether the record establishes any legally acceptable justification for the population variances. It was the burden of the State "to present . . . acceptable reasons for the variations among the populations of the various . . . districts . . . ." *Swann* v. *Adams*, *supra*, at 443–444.

II.

We agree with the District Court that Missouri has not satisfactorily justified the population variances among the districts.

Missouri contends that variances were necessary to avoid fragmenting areas with distinct economic and social interests and thereby diluting the effective representation of those interests in Congress. But to accept population variances, large or small, in order to create districts with specific interest orientations is antithetical to the basic premise of the constitutional command to provide equal representation for equal numbers of people. "[N]either history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes." *Reynolds* v. *Sims*, *supra*, at 579–580. See also *Davis* v. *Mann*, 377 U. S. 678, 692 (1964).

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and our affirmances were based on agreement with the use of the plans in that circumstance, and not on any view that the plans in question achieved equality as nearly as practicable.

We also reject Missouri's argument that "[t]he reasonableness of the population differences in the congressional districts under review must . . . be viewed in the context of legislative interplay. The legislative leaders all testified that the act in question was in their opinion a reasonable legislative compromise. . . . It must be remembered . . . that practical political problems are inherent in the enactment of congressional reapportionment legislation."[3] We agree with the District Court that "the rule is one of 'practicability' rather than political 'practicality.'" 279 F. Supp., at 989. Problems created by partisan politics cannot justify an apportionment which does not otherwise pass constitutional muster.

Similarly, we do not find legally acceptable the argument that variances are justified if they necessarily result from a State's attempt to avoid fragmenting political subdivisions by drawing congressional district lines along existing county, municipal, or other political subdivision boundaries. The State's interest in constructing congressional districts in this manner, it is suggested, is to minimize the opportunities for partisan gerrymandering. But an argument that deviations from equality are justified in order to inhibit legislators from engaging in partisan gerrymandering[4] is no more than a variant of the

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[3] Brief for Appellants, at 37–38.

[4] It is dubious in any event that the temptation to gerrymander would be much inhibited, since the legislature would still be free to choose which of several subdivisions, all with their own political complexion, to include in a particular congressional district. Besides, opportunities for gerrymandering are greatest when there is freedom to construct unequally populated districts. "[T]he artistry of the political cartographer is put to its highest test when he must work with constituencies of equal population. At such times, his skills can be compared to those of a surgeon, for both work under fixed and arduous rules. However, if the mapmaker is free to allocate varying populations to different districts, then the butcher's cleaver replaces the scalpel; and the results reflect sharply the difference in the method of operation." Hacker, Congressional Districting, 51 (1963).

argument already rejected, that considerations of practical politics can justify population disparities.

Missouri further contends that certain population variances resulted from the legislature's taking account of the fact that the percentage of eligible voters among the total population differed significantly from district to district—some districts contained disproportionately large numbers of military personnel stationed at bases maintained by the Armed Forces and students in attendance at universities or colleges. There may be a question whether distribution of congressional seats except according to total population can ever be permissible under Art. I, § 2. But assuming without deciding that apportionment may be based on eligible voter population rather than total population, the Missouri plan is still unacceptable. Missouri made no attempt to ascertain the number of eligible voters in each district and to apportion accordingly. At best it made haphazard adjustments to a scheme based on total population; overpopulation in the Eighth District was explained away by the presence in that district of a military base and a university; no attempt was made to account for the presence of universities in other districts or the disproportionate numbers of newly arrived and short-term residents in the City of St. Louis. Even as to the Eighth District, there is no indication that the excess population allocated to that district corresponds to the alleged extraordinary additional numbers of noneligible voters there.

Missouri also argues that population disparities between some of its congressional districts result from the legislature's attempt to take into account projected population shifts. We recognize that a congressional districting plan will usually be in effect for at least 10 years and five congressional elections. Situations may arise where substantial population shifts over such a period can be

anticipated. Where these shifts can be predicted with a high degree of accuracy, States that are redistricting may properly consider them. By this we mean to open no avenue for subterfuge. Findings as to population trends must be thoroughly documented and applied throughout the State in a systematic, not an *ad hoc*, manner. Missouri's attempted justification of the substantial under-population in the Fourth and Sixth Districts falls far short of this standard. The District Court found "no evidence . . . that the . . . General Assembly adopted any policy of population projection in devising Districts 4 and 6, or any other district in enacting the 1967 Act." 279 F. Supp., at 983.

Finally, Missouri claims that some of the deviations from equality were a consequence of the legislature's attempt to ensure that each congressional district would be geographically compact. However, in *Reynolds* v. *Sims*, *supra*, at 580, we said, "Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's, most claims that deviations from population-based representation can validly be based solely on geographical considerations. Arguments for allowing such deviations in order to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired are today, for the most part, unconvincing." In any event, Missouri's claim of compactness is based solely upon the unaesthetic appearance of the map of congressional boundaries that would result from an attempt to effect some of the changes in district lines which, according to the lower court, would achieve greater equality. A State's preference for pleasingly shaped districts can hardly justify population variances.

Affirmed.

SUPREME COURT OF THE UNITED STATES

Nos. 30 AND 31.—OCTOBER TERM, 1968.

James C. Kirkpatrick, Secretary of State of Missouri, et al., Appellants,
30 v.
Paul W. Preisler et al.

F. V. Heinkel et al., Appellants,
31 v.
Paul W. Preisler et al.

On Appeals From the United States District Court for the Western District of Missouri.

[April 7, 1969.]

MR. JUSTICE FORTAS, concurring.

I concur in the judgment of the Court in this case, but I cannot subscribe to the standard of near-perfection which the Court announces as obligatory upon state legislatures facing the difficult problem of reapportionment for congressional elections.

In *Wesberry* v. *Sanders*, 376 U. S. 1 (1963), this Court recognized that "it may not be possible to draw congressional districts with mathematical precision," and it held that the Constitution requires that they be drawn so that "as nearly as is practicable," each representative should cast a vote on behalf of the same number of people.

The Court now not only interprets "as nearly as practicable" to mean that the State is required to "make a good-faith effort to achieve precise mathematical equality," but it also requires that any remaining population disparities "no matter how small," be justified. It then proceeds to reject, *seriatim*, every type of justification that has been—possibly, every one that could be—advanced.

I agree that the state legislatures should be required to "make a good-faith effort to achieve" a result that

allocates the population or the residents[1] of the State in roughly equal numbers to each district, based upon some orderly and objective method.[2] In my view, the State could properly arrive at figures for current population by taking the latest census returns and making modifications to allow for population movements since the last census (which the Court seems to find acceptable). It could also, in my opinion, discount the census figures to take account of the presence of significant transient or nonresident population in particular areas (an adjustment as to which the Court indicates doubt). If the State should proceed on some appropriate population basis such as I have suggested, producing approximately equal districts, trial courts, in my judgment, would be justified in declining to disapprove the result merely because of small disparities, in the absence of evidence of gerrymandering—the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes.

In considering whether the State has "approximated" an equal division and allocation of the population, I sympathize with the majority's view that a "de minimis" rule of allowable disparities tends to demean in theory

[1] I would find it constitutionally entirely acceptable for a State to base its apportionment on numbers of residents, rather than total population, in each district at the time the districts are established. This would permit adjustments to take account, for example, of distortions resulting from large numbers of nonresidents at military installations or colleges in an area.

[2] In *Avery* v. *Midland County*, 390 U. S. 474, 495 (1968), I argued in a dissenting opinion that consideration of disparate local interests might be appropriate with respect to defining certain types of local government units exercising limited governmental powers. I noted there, however, that the same factors could not justify departing from the one man-one vote theory in state legislatures—or, I might now add, congressional districts—because of the general and basic nature of the function performed.

and in practice the constitutional objective because it suggests that it is not necessary even to aim at equality. On the other hand, to reject "de minimis" as a statement of the limits on the rule of equality should not lead us to toss aside the wise recognition of the inscrutability of fact and the imperfection of man which is implicit in the *Wesberry* standard: "as nearly as practicable." This phrase does not refer merely to arithmetical possibilities. Arithmetically, it is possible to achieve division of a State into districts of precisely equal size, as measured by the decennial census or any other population base. To carry out this theoretical possibility, however, a legislature might have to ignore the boundaries of common sense, running the congressional district line down the middle of the corridor of an apartment house or even dividing the residents of a single-family house between two districts. The majority opinion does not suggest so extreme a practical application of its teaching, and I mention it only because the example may dramatize the fallacy of inflexible insistence upon mathematical exactness, with no tolerance for reality.

Whatever might be the merits of insistence on absolute equality if it could be attained, the majority's pursuit of precision is a search for a will-o'-the wisp. The fact is that any solution to the apportionment and districting problem is at best an approximation because it is based upon figures which are always to some degree obsolete. No purpose is served by an insistence on precision which is unattainable because of the inherent imprecisions in the population data on which districting must be based. The base to which Missouri's legislature should have adhered precisely, according to the majority, is the 1960 decennial census. The legislature's plan here under review was enacted in 1967. Assuming perfect preci-

sion for the 1960 census when taken,[3] by 1967, because of the movement of population within the State as well as in-and-out migration, substantial disparities had arisen between the real distribution of population in the State and that reflected in the 1960 census base here so zealously protected by the Court.[4]

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[3] The basic enumeration error in the census—that is the variation which would be observed between successive enumerations of the same area—is very low. Second surveys of selected areas, conducted by specially trained enumerators produced counts varying by only about 1% for the whole population from the counts of the regular enumerators. For particular groups in the population, the variance was significantly larger. See Bureau of the Census, Evaluation and Research Program, 1960 Census, Table 24, p. 22.

Far more significant than variations between successive enumerations are errors—virtually all undercountings—which are produced by the inherent limitations of the enumerating system. A Census Bureau estimate indicates that the 1960 census counted only 97.2% of the whole population, 2.8% of the people not being found and counted by the enumerators. Undercounting was not evenly distributed over the whole population. Instead, members of certain groups, notably young adult Negroes, were far more likely to be missed by the enumerators. For nonwhites in all age groups the census was estimated to understate the actual population by 8.2%. For young adult Negro males, undercounting reached nearly 20% for some five-year age groups. See generally, Siegel, Completeness of Coverage of the Nonwhite Population in the 1960 Census and Current Estimates, and Some Implications, Report, Conference on Social Statistics and the City, Washington, D. C. 13 (Heer ed., 1967). Because the heavily undercounted groups are not evenly distributed over the country, the differential rates of undercounting produce divergences between the actual relative populations of particular areas and those indicated by the census.

[4] The Census Bureau has estimated that of Missouri's 115 counties, 52 lost population between 1960 and 1966, while 63 gained. St. Louis City lost 57,900, or 7.7%; St. Louis County gained 146,000 or 20.8%. Outside St. Louis City and County, the absolute change ranged from a 22,100 increase in St. Charles County to a 7,100 decrease in Dunklin County. The percentage change ranged from a 41.7% increase in St. Charles County to a 21.4% decrease in Holt County. Estimates of the Population of Counties: July 1, 1966 (Report

Nothing that I have said should be taken as indicating that I do not believe that the *Wesberry* standard requires a high degree of correspondence between the demonstrated population or residence figures and the district divisions. Nor would I fix, at least at this relatively early stage of the reapportionment effort, a percentage figure for permissible variation.[5]

In the present case, however, I agree that the judgment of the District Court should be affirmed. The history of this reapportionment and of the legislature's failure to comply with the plain and patient directions of the three-judge District Court and the failure of the legislature to use either accurate 1960 census figures or other systematically obtained figures for all the districts—these factors strongly support the District Court's refusal to accept the Missouri plan. It is true that on the average, there was only a 1.6% variation from what the majority quaintly calls the "ideal" (meaning the 1960 census figures) and in only three of the 10 districts was there a variation of 2% or more, and it is also true that there is no finding of gerrymandering. But regardless of the possibility that variances within this range might in some situations be considered tolerable within *Wesberry*'s standard, I agree that we should sustain the District Court' rejection of the plan in light of the history of the case and the record of the plan's preparation.

No. 3), Current Population Reports, Population Estimates, Ser. P-25, No. 407 (Bureau of the Census, October 10, 1968), pp. 11–13.

[5] Cf. *Reynolds* v. *Sims*, 377 U. S. 533, 578 (1964):

"For the present we deem it expedient not to attempt to spell out any precise constitutional tests. What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative reapportionment."

SUPREME COURT OF THE UNITED STATES

Nos. 30, 31, AND 238.—OCTOBER TERM, 1968.

James C. Kirkpatrick, Secretary of State of Missouri, et al., Appellants, v. Paul W. Preisler et al.	On Appeals From the United States District Court for the Western District of Missouri.
F. V. Heinkel et al., Appellants, v. Paul W. Preisler et al.	
David I. Wells, Appellant, v. Nelson A. Rockefeller, as Governor of the State of New York, et al.	On Appeal From the United States District Court for the Southern District of New York.

[April 7, 1969.]

MR. JUSTICE HARLAN, with whom MR. JUSTICE STEWART joins, dissenting.

Whatever room remained under this Court's prior decisions for the free play of the political process in matters of reapportionment is now all but eliminated by today's Draconian judgments. Marching to the nonexistent "command of Art. I, § 2" of the Constitution,[1] the Court now transforms a political slogan into a constitutional absolute. Strait indeed is the path of the righteous legislator. Slide rule in hand, he must

[1] See *Kirkpatrick* v. *Preisler*, *ante*, at 4; *Wells* v. *Rockefeller*, *ante*, at 4. I have discussed in my dissenting opinion in *Wesberry* v. *Sanders*, 376 U. S. 1, 20 (1964), the extraordinary historical leap involved in reading the straightforward constitutional provision that "The House of Representatives shall be composed of Members chosen every second year by the People of the several States . . ." as a command for equal districts.

avoid all thought of county lines, local traditions, politics, history, and economics, so as to achieve the magic formula: one man, one vote.

As my Brothers WHITE and FORTAS demonstrate, insistence on mathematical perfection does not make sense even on its own terms. Census figures themselves are inexact; our mobile population rapidly renders them obsolete; large groups of ineligible voters are unevenly distributed throughout the State. Nevertheless, the Court refuses to permit any room for legislative common sense to compensate for Census Bureau inadequacies. If no "scientific" data is available to justify a divergence from census figures, the Court holds that nothing can be done—"we mean to open no avenue for subterfuge." *Kirkpatrick* v. *Preisler*, at 9.

This all-pervasive distrust of the legislative process is completely alien to established notions of judicial review. See *Butler* v. *Pennsylvania*, 10 How. 402 (1850); *Davis* v. *Department of Labor*, 317 U. S. 249 (1942); *Fleming* v. *Nestor*, 363 U. S. 603 (1960). Nor does it have precedent in the prior reapportionment decisions themselves. "*Reynolds* v. *Sims*, . . . recognized that mathematical exactness is not required in state apportionment plans. *De minimis* deviations are unavoidable. . . ." *Swann* v. *Adams*, 385 U. S. 440, 445 (1966); see also *Wesberry* v. *Sanders*, 376 U. S. 1, 18 (1964).[2]

Even more important, the Court's exclusive concentration upon arithmetic blinds it to the realities of the political process, as the *Rockefeller* case makes so clear. The fact of the matter is that the rule of absolute equality is perfectly compatible with "gerrymandering" of the worst sort. A computer may grind out district

[2] While *Wesberry* cautions that "it may not be possible to draw congressional lines with mathematical precision," 376 U. S., at 18, it did not attempt to delineate the extent to which the States may properly deviate from the "ideal."

lines which can totally frustrate the popular will on an overwhelming number of critical issues. The legislature must do more than satisfy one man-one vote; it must create a structure which will in fact as well as theory be responsive to the sentiments of the community. On the record before us, however, there is absolutely no indication that the New York Legislature can satisfy this Court's demand for absolute equality and yet create a structure which will permit New York's multitude of political groups to have a fair chance at having their voices heard in Congress.

Even the appellants themselves do not suggest that it is possible to create a proper apportionment plan which is at the same time consistent with the demands of perfect mathematical equality. The plan they advance contemplates a maximum deviation of 4.7% from the state average, which represents an improvement of only 1.9 percentage points on the State's 6.6% deviation. Moreover, under the State's plan, a majority of the congressional delegation can represent no less than 49.3% of the population. The appellant's scheme "improves" this figure by .5%, increasing the number to 49.8%. See Appellant's Appendix D. Perfection, however, is still .2% away.

Although the appellant's plan offers such marginal benefits of voting egalitarianism, and although the record contains no suggestion of any other plan which even arguably permits the coherent expression of the popular will, the Court rejects the legislature's considered proposal simply because it seeks to remain true to traditional county and regional lines. In doing so, the majority ignores the salutary warning to be found in *Reynolds* v. *Sims*, 377 U. S. 533, 578 (1963): "Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering." Yet,

today the Court condemns the legislature's approach because it "permit[s] groups of districts with defined interest orientations to be over-represented at the expense of districts with different interest orientations." *Wells* v. *Rockefeller*, at 4–5. Of course, all districting decisions inevitably involve choices between different interest groups. But as *Reynolds* recognized, legislatures prefer to follow traditional county and regional lines so that the demands of blatant partisanship will be tempered by the constraints of history and tradition. If the Court believes it has struck a blow today for fully responsive representative democracy, it is sorely mistaken. Even more than in the past, district lines are likely to be drawn to maximize the political advantage of the party temporarily dominant in public affairs.

We do not deal here with the hopelessly malapportioned legislature unwilling to set its own house in order. Rather, the question before us is whether the Constitution requires that mathematics be a substitute for common sense in the art of statecraft. As I do not think that the apportionment plans submitted by the States of New York and Missouri can properly be regarded as offensive to the requirement of equality imposed in *Wesberry*—a case whose constitutional reasoning I still find it impossible to swallow, but by whose dictate I consider myself bound—I dissent.

I would reverse the judgments of the District Court in the Missouri cases and affirm the decision of the District Court in the *Rockefeller* case.

SUPREME COURT OF THE UNITED STATES

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[April 7, 1969.]

MR. JUSTICE WHITE, dissenting.

I have consistently joined the Court's opinions which establish as one of the ground rules for legislative districting that single member districts should be substantially equal in population. I would not now dissent if the Court's present judgment represented a measurable contribution to the ends which I had thought the Court was pursuing in this area, or even if I thought the opinion not very useful but not harmful either. With all due respect, however, I am firmly convinced that the Court's new ruling is an unduly rigid and unwarranted application of the Equal Protection Clause which will unnecessarily involve the courts in the abrasive task of drawing district lines.

Accepting for constitutional purposes that a State may assign the task of apportioning its legislature or con-

gressional delegation to the legislature itself, I would not quibble with the legislative judgment if variations between districts were acceptably small. And I would be willing to establish a population variation figure which if not exceeded would normally not call for judicial intervention. As a rule of thumb, a variation between the largest and the smallest district of no more than 10 to 15% would satisfy me, absent quite unusual circumstances not present in either one of these two cases. At the very least, at this trivial level, I would be willing to view state explanations of the variance with a more tolerant eye.

This would be far more reasonable than the Court's demand for an absolute but illusory equality or for an apportionment plan which approaches this goal so nearly that no other plan can be suggested which would come nearer. As MR. JUSTICE FORTAS demonstrates, the 1960 census figures were far from accurate when they were compiled by professional enumerators and statisticians bent on precision, in 1960. Massive growth and shifts in population since 1960 made the 1960 figures even more inaccurate by 1967. That is why a new census is taken every 10 years. When the Court finds a 3% variation from substantially inexact figures constitutionally impermissible it is losing perspective and sticking at a trifle.

It also seems arbitrary for the majority to discard the suggestion of *Reynolds* v. *Sims*, 377 U. S. 533 (1964), that if a legislature seeks an apportionment plan which respects the boundaries of political subdivisions, some variations from absolute equality would be constitutionally permissible. Of course, *Reynolds* involved state legislative apportionment and took pains to say that there may be more leeway in that context. But the Court invokes *Reynolds* today and in no way distinguishes federal from state districting.

Reynolds noted that "[i]ndiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering." 377 U. S. 533, 578-579. The Court nevertheless now rules that regard for these boundaries is no justification for districts which vary no more than 3% from the norm where another plan which may have no regard for district lines reduces the variation to an even smaller figure. I have similar objections to the Court's rejection of geographical compactness as an acceptable justification for minor variations among congressional districts. This rejection of the virtues of compactness will not be lost on those who would use congressional and legislative districting to bury their political opposition.

In reality, of course, districting is itself a gerrymandering in the sense that it represents a complex blend of political, economic, regional, and historical considerations. In terms of the gerrymander, the situation will not be much different if equality means what it literally says—a zero variation—rather than only "substantial" equality which would countenance some variations among legislative districts. Either standard will prevent a minority of the population or a minority party from consistently controlling the state legislature or a congressional delegation and both are powerful forces toward equalizing voter influence on legislative performance. In terms of effective representation for all voters there are only miniscule differences between the two standards. But neither rule can alone prevent deliberate partisan gerrymandering if that is considered an evil which the Fourteenth Amendment should attempt to proscribe.

Today's decision on the one hand requires precise adherence to admittedly inexact census figures, and on the

other downgrades a restraint on a far greater potential threat to equality of representation, the gerrymander. Legislatures intent on minimizing the representation of selected political or racial groups are invited to ignore political boundaries and compact districts so long as they adhere to population equality among districts using standards which we know and they know are sometimes quite incorrect. I see little merit in such a confusion of priorities.

Moreover, today's decision will lead to an unnecessary intrusion of the judiciary into legislative business. It would be one thing if absolute equality were possible. But, admittedly, it is not. The Court may be groping for a clean-cut, *per se* rule which will minimize confrontations between courts and legislatures while also satisfying the Fourteenth Amendment. If so, the Court is wide of the mark. Today's result simply shifts the area of dispute a few percentage points down the scale; the courts will now be engaged in quibbling disputes over such questions as whether a plan with a 1% variation is "better" than one with a larger variation, say 1.1% or even 2%. If county and municipal boundaries are to be ignored, a computer can produce countless plans for absolute population equality, one differing very little from another, but each having its own very different political ramifications. Ultimately, the courts may be asked to decide whether some families in an apartment house should vote in one district and some in another, if that would come closer to the standard of apparent equality. Using the spacious language of the Equal Protection Clause to inject the courts into these minor squabbles is an unacceptable pre-emption of the legislative function. Not only will the Court's new rule necessarily precipitate a new round of congressional and legislative districting, but I fear that in the long run the courts, rather than

the legislatures or nonpartisan commissions, will be making most of the districting decisions in the several States. Since even at best, with compact and equal districts, the final boundary lines unavoidably have significant political repercussions, the courts should not draw district lines themselves unnecessarily. I therefore dissent.